SUPREME COURT, U.S.
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No. 86-1762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

PETITION OF MANHATTAN EYE, EAR & THROAT HOSPITAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit and the NLRB erred in refusing to give effect to the employer's valid withdrawal of recognition of a union that no longer enjoyed majority support, because of an unrelated de minimis employer unfair labor practice that did not involve the anti-union majority?

2. Whether the Second Circuit and the NLRB erred in holding that statements to employees made by a supervisor, without any coercion, threat, or promise of benefit, constituted an unfair labor practice?

PARTIES

The following are the parties who appeared before the Second Circuit Court of Appeals in this case:

National Labor Relations Board, Petitioner.

Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO

Manhattan Eye, Ear & Throat Hospital, Respondent.

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October Term, 1986

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OPINIONS BELOW

The opinion of Administrative Law Judge Lawrence, dated August 16,

1985, is not reported. A copy is included in the separately bound appendix to this Petition at A1-A108. The opinion of the National Labor Relations Board (the "Board") is dated May 30, 1986 and is reported at 280 NLRB No. 11; a copy is included in the Appendix at A109-A130. The decision of the Second Circuit Court of Appeals enforcing the NLRB's order was entered February 6, 1987 and is not yet reported; a copy is included in the Appendix at A131-A133. The Second Circuit's decision denying petitioner's petition for rehearing was entered March 31, 1987 and is not reported; a copy is included in the Appendix at A134-A135.

JURISDICTIONAL STATEMENT

Manhattan Eye, Ear & Throat Hospital (the "Hospital") seeks to invoke the Court's jurisdiction under 28

U.S.C. § 1254(1). The judgment of which review is sought was entered in the Second Circuit Court of Appeals on February 6, 1987, and the Second Circuit's order denying the petition for rehearing was entered on March 31, 1987.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c):

> The expressing of any views, argument, or opinion, or the

> dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sections 8(a)(1),(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1),(5):

> (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

The Hospital seeks review of a Second Circuit decision enforcing a Board bargaining order which nullified a plea by the majority of a bargaining unit that recognition of an incumbent union be withdrawn. The Board's only basis for nullifying the will of the majority was a finding of an earlier de minimis unfair labor practice that had no nexus to the demand for withdrawal of recognition. As to the unfair labor practice itself, the Board's decision disregarded Section 8(c) of the National Labor Relations Act (the "Act") and the First Amendment, in finding a violation which consisted of nothing but an expression of opinion, with no threat, coercion or promise of benefit. On both counts, the Second Circuit's enforcement of the Board's decision represents a

significant curtailment of rights heretofore recognized to be guaranteed by the Act: with respect to the employees, their right freely to choose or reject their representative in accordance with Section 7 of the Act, and with respect to the employer, the right of supervisors to exercise free speech in accordance with Section 8(c) of the Act. Because the Second Circuit's endorsement[1] of the Board's

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[1] Although the Second Circuit in this case acted by summary order rather than by formal published opinion, that is of no moment here. Such dispositions have become commonplace in the Second Circuit. According to the Second Circuit's recent report titled "Judicial Business of the Second Circuit," in recent years the percentage of its cases disposed of by summary order or oral decision ranged from 54% to 65.7%. Furthermore, since the fact that the Second Circuit granted the Board's petition for enforcement will doubtless be reported (even though the text of the summary order is not expected to be published), the Board's opinion in this case has for all practical purposes become the law of the Circuit.

new, restricted reading of those provisions conflicts fundamentally with the statutory scheme fashioned by Congress and with the interpretation of other circuits (especially with respect to the propriety of a finding of a violation of Section 8(a)(5) and consequent entry of a bargaining order under this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)), the Hospital respectfully petitions this Court to issue a writ of certiorari.

The Facts

Petitioner Manhattan Eye, Ear & Throat Hospital, the employer, is a specialty surgical Hospital located on the Upper East Side of Manhattan in New York City. In the summer of 1984, it became embroiled in a citywide hospital strike called by District (now Local)

1199 of the Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO (the "Union"). The Union represented separate bargaining units of service workers and registered nurses at the Hospital. The strike was called to secure a benefit for the service workers which was already enjoyed by the nurses; though the nurses, to that extent, had nothing at stake, they were required to join the strike under threat of Union fines. ALJ Dec. A5.[2] Five days after the strike began -- and before the

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[2] References preceded by "ALJ Dec." or "Board Dec." are to the decisions of the Administrative Law Judge or of the Board, followed by the page of the Appendix where the referenced material may be found. The facts set forth herein are either undisputed facts supported by the record in the Court of Appeals or facts found by the Administrative Law Judge; as to the latter, the Board affirmed those findings to the extent consistent with its Decision and Order. Board Dec. A110.

unfair labor practice alleged in this case had occurred -- a group of nurses at the Hospital filed a decertification petition with the Board. ALJ Dec. A6-A7. An election to determine whether the Union still had the support of a majority of the nurses at the Hospital was scheduled by the Board for August 30, 1984.

After the decertification petition was filed, nurses began to cross the picket line and return to work in greater and greater numbers. Many of these nurses resigned from the Union before crossing the picket line, to protect themselves from Union fines; that they were doing so was widely known, and a frequent topic of conversation among the nurses at the Hospital. ALJ Dec. A62-A63. As more nurses returned to work, the Hospital opened more floors and admitted more

patients. In order to plan this process more efficiently, the Hospital made inquiries of the nurses who had not yet returned to work as to their plans in that regard. ALJ Dec. A47. There is no dispute that those inquiries in and of themselves were perfectly lawful.

A part-time weekend relief supervisor at the Hospital, Euphemia James, whose regular job was as a staff nurse at a local Veterans' Hospital, was campaigning in this period for re-election to the presidency of the Philippine Nurses Association. Part of her campaign involved making telephone calls to Filipino nurses all over the city, including her co-workers at the Hospital. When she told the Hospital that she was making such calls, she was asked, while she was at it, to find out whether any of the Hospital's nurses with whom she spoke intended to come

back to work. ALJ Dec. A47. In doing so, James apparently took it upon herself to express the view to a few nurses that, if they decided to return to work (which necessarily would have entailed crossing the picket line), it would be advisable to resign from the Union first. ALJ Dec. A48-A69. The handful of nurses with whom James spoke conceded at the hearing below that she did not threaten them or promise them any benefit; that they did not feel in any way coerced by her suggestions; and that they did not alter their behavior as a result. ALJ Dec. A67-A68. The nurses told James that they would make up their own minds about whether to come back to work. ALJ Dec. A35-A46.

When the Union learned of these conversations, it filed an unfair labor practice charge to block the upcoming secret ballot election. The Board

cancelled the election pending further investigation of the charge. The nurses who had been campaigning for decertification, chagrined at the election cancellation and concerned that, as the strike came to a close, a collective bargaining agreement would be negotiated for them by a union which no longer enjoyed majority support, immediately launched a new campaign to prevent the Hospital from bargaining further with the Union. Within two weeks, a majority of the staff nurses had signed cards demanding that the Hospital no longer recognize the Union as their representative. Significantly, those cards (which were in evidence before the ALJ) revealed that the anti-union majority who signed them did not include <u>any</u> of the nurses who were party to the conversations which the Board later found to be an unfair labor

practice. Even more significantly, there was no evidence before the Board that any nurse in the anti-union majority even knew about the conversations which constituted the unfair labor practice. On September 6, 1984, the cards demanding withdrawal of recognition were presented to Hospital management. On the basis of this clear expression of majority sentiment, and the obligations created thereby under Section 7 of the Act, the Hospital withdrew recognition of the Union on September 7. ALJ Dec. A8, A80-A82. More charges from the Union followed.

The Proceedings Below

The Board's General Counsel issued a series of unfair labor practice complaints based on the Union's charges, which were consolidated and tried on March 4-8, 1985, before Administrative

Law Judge Harold B. Lawrence (the "ALJ"). The ALJ's decision was issued on August 16, 1985. A1-A108. With respect to the charge concerning James,[3] the ALJ credited the Union's witnesses' versions of their conversations with James, but held that James had committed no unfair labor practice. In view of the widespread discussion and knowledge about nurses resigning from the Union, he found it impossible to determine from the evidence presented whether James' suggestion that nurses resign was intended to protect them from fines, or was meant to cause general disaffection from the Union. Since the Board's General Counsel bore the burden of proof on this issue, and the preponderance of

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[3] The ALJ's dismissal of all the charges except for the one involving James was sustained by the Board, so those charges are not discussed here.

the evidence did not support the more sinister inference, the ALJ dismissed the complaint. ALJ Dec. A59-A61.

The Board's General Counsel took no exception to the ALJ's dismissal of the charges concerning James, but the Union took exception in that regard. On May 30, 1986, the Board issued its decision and order which was enforced by the Second Circuit and which is therefore at issue here. A109-A130. The Board affirmed all of the ALJ's findings and conclusions, except with respect to James. As to that charge, the Board held that it had not been specifically proven at the hearing that James was referring to the risk of Union fines in giving advice about resigning from the Union; thus, apparently, some more sinister intent should have been presumed by the ALJ (Board Dec. A119-A120), even in the absence of any

evidence that James actually was aiming to create general disaffection from the Union. The Board concluded that the Hospital, through James, had committed an unfair labor practice. Board Dec. A123.

The issue of whether there had been any causal relationship established between James' alleged unfair labor practice and the subsequent demand by a majority of the nurses that recognition be withdrawn had been litigated before the ALJ, but he declined to reach the issue because he found that no unfair labor practice had been committed. ALJ Dec. A89. In taking exception before the Board to that finding, the Union specifically raised the claim -- but did not brief it or otherwise explain its evidentiary basis -- that James' conduct somehow tainted the withdrawal of recognition. The Board not only reversed the ALJ on whether James'

conversations violated Section 8(a)(1) of the Act; it further held that such violation invalidated the Hospital's withdrawal of recognition and that the withdrawal therefore violated Section 8(a)(5). The Board ordered the Hospital to bargain with the Union, thereby nullifying the expressed will of the majority of the nurses that the Union no longer represent them. The Board found the Section 8(a)(5) violation and imposed this drastic remedy without even purporting to find any causal link between James' conversations and the majority petition for withdrawal of recognition. Rather, the Board simply said that the Hospital's good faith doubt as to the Union's majority support did not occur in a "context" free of unfair labor practices aimed at causing union disaffection. Board Dec. A122. Thus, for what was at most a de minimis

violation by a low-level part-time supervisor which neither coerced nor harmed anyone, the Board found a Section 8(a)(5) violation and issued a bargaining order which extinguished the nurses' right to select or reject their representative under Section 7 of the Act.

By summary decision filed on February 6, 1987, the Court of Appeals granted a Board application to enforce its order. A131. On March 31, 1987, the Court of Appeals denied the Hospital's petition for rehearing with a suggestion for rehearing in banc. A134.

ARGUMENT

I. The Decision Below that the Hospital Violated § 8(a)(5) of the Act Abrogates the Nurses' Right of Self Determination Under § 7 of the Act.

Perhaps the most significant aspect of the Board's decision in this

case is not anything it said, but rather what it did not say: The Board never found any causal link between the Hospital's unfair labor practice (assuming that it occurred at all[4]) and the Hospital's withdrawal of recognition of the Union based on a good faith doubt about the Union's majority status. On the contrary, the Board seems to take the position that James' statements automatically precluded the nurses from exercising their rights under Section 7 of the Act: "Having found this violation, we further find that the [Hospital's] asserted good faith doubt of the Union's continued

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[4] In point II below we show that the Second Circuit erroneously sustained the Board's finding of an unfair labor practice, since the alleged unfair labor practice consisted solely of speech protected by § 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c) and by the First Admendment.

majority status was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union." A124. In other words, the Board is saying that because of the Hospital's unfair labor practice, the Board would not allow the nurses to exercise the rights that Congress guaranteed them in Section 7 of the Act, to "refrain" from bargaining collectively through a union. The Board did not even purport to find that the anti-union majority who petitioned the Hospital to withdraw recognition was even aware of, much less influenced by, James' statements to a few of the other nurses.

To reject the will of the majority in this case, as the Board and the Circuit Court have done, is fundamentally at odds with the purpose of Section 7 of the Act, which includes

protecting the majority's right to refuse representation. Indeed, until the Second Circuit granted the Board's petition for enforcement in this case,[5] the Circuit Courts of Appeal had uniformly held that an unfair labor practice could only invalidate an

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[5] In the Second Circuit Court of Appeals, counsel for the Board asserted that the Court could not address the absence of a causal link between James' conversations and the majority's petition to the Hospital, under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Hospital had not raised that issue in the proceedings before the Board (see the Board's brief on appeal, at pp. 19-23). In fact, the issue was before the Board. It had been litigated before the ALJ and therefore before the Board: the Hospital's brief to the ALJ devoted 16 pages to the issue, and the Board's own regulations require that it review the entire record before the ALJ, including the briefs. 29 C.F.R. § 101.12. Furthermore, the Union had raised the issue before the Board itself. The Court of Appeals, in basing its decision on the "substantial evidence" rule rather than on Section 10(e), evidently rejected the Board's argument in this regard.

otherwise proper withdrawal of recognition if there was a causal link between the unfair labor practice and the disaffection of a majority of the bargaining unit, and had refused to enforce Board orders where such a link did not exist.

For example, in Daisy's Originals, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972), like here, a possible decertification election was blocked, at first because a current contract was in effect and then because the union filed unfair labor practice charges; under Board policy, the mere filing of unfair labor practice charges blocks an election. Id. at 502. The majority of the employees, having no other means of asserting their Section 7 rights, petitioned the employer directly to withdraw recognition. Id. at 495. The employer refused to bargain with

the union, which then filed unfair labor practice charges under Section 8(a)(5) because of the employer's refusal to bargain. Id. at 496. The Board found that the employer had committed an unfair labor practice in the form of communications to employees that promised benefits if they were not covered by a union contract, and then ruled that the employer had therefore improperly withdrawn recognition of the union in violation of Section 8(a)(5) and ordered the employer to bargain with the union. Id. at 498.

The Court reversed the finding of a Section 8(a)(5) violation and refused to enforce the bargaining order. It noted that a bargaining order has the effect of stripping the employees of their Section 7 rights, and reviewed the law of bargaining orders as a remedy in the wake of the leading case

of NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). 468 F.2d at 499-502. The court then indicated that the same considerations which lead courts to be circumspect in enforcing bargaining orders in the context of a new union should also apply where the bargaining order is in favor of an incumbent union. The court found no violation of Section 8(a)(5) and refused to enforce the bargaining order because "the need to effectuate employee freedom of choice is as equally an important goal as is the need to deter and remedy employer misconduct . . . . Where the unfair labor practices found have not been determined to be 'sufficiently flagrant so that an election could not be held or should be set aside under the Gissel rule,' a bargaining order remedy to technical violations of § 8(a)(1) is unwarranted." 468 F.2d at 503.

See also NLRB v. NuSouthern Dyeing & Finishing, Inc., 444 F.2d 11, 15-16 (4th Cir. 1971) (denies enforcement of Board's bargaining order; the unfair labor practice must "significantly contribute to [the] loss of majority or to the factors upon which a doubt of such a majority is based"); Hotel, Motel and Restaurant Employees and Bartenders Union v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986); Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 177 (4th Cir. 1981) (court refuses to enforce the Board's order because, in part, Board adduced no evidence of cause and effect relationship between unfair labor practice and disaffection of the majority of bargaining unit employees from the union); National Cash Register Co. v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974) (court refused to enforce Board's

bargaining order following withdrawal of recognition, because the "record . . . fails to disclose any substantial evidence from which a permissible inference could be made that the unfair labor practices contributed generally to the possible loss of majority status . . ."); NLRB v. Anvil Products, Inc., 496 F.2d 94, 96-98 (5th Cir. 1974); Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980).

The last time this Court extensively addressed the tension between employees' Section 7 rights and the occasional need for bargaining orders to remedy violations of Section 8(a) was in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). That case involved the propriety of a Board finding of a violation of Section 8(a)(5) and consequent bargaining order in the context of an organizational campaign

where the union holds authorization cards from a majority of the employees but the Board finds that employer unfair labor practices interfered with an election. In Gissel this Court held that in certain circumstances the Board could find that an employer unlawfully refused to bargain in violation of Section 8(a)(5) of the Act based on the union's card majority notwithstanding the absence of a union victory in an election and certification, if the employer's unfair labor practices actually adversely affected employees' exercise of their Section 7 rights. Id. at 613-615.

Here, a different but analogous situation is presented: The Union had been certified following an election years earlier, and subsequent events (i.e., the nurses' petition to the Hospital) led the Hospital in good faith to doubt the continued majority support

of the Union and refuse to bargain with the Union. Meanwhile, a relatively minor unfair labor practice was occurring, involving a few nurses who were not among the anti-union majority that had submitted the petition. Until this case, the Circuit Courts of Appeal have viewed such situations as being governed by the same considerations as Gissel, because of the potential interference with employees' rights implicit in a finding of a violation of Section 8(a)(5) in the face of an apparent anti-union majority. Indeed, in Daisy's Originals and other cases cited above, the Circuit Courts of Appeal have, on the basis of Gissel, refused to enforce bargaining orders in circumstances similar to those present here. See, e.g., Peoples Gas System, Inc. v. NLRB, 629 F.2d 35, 47 n.21 (D.C. Cir. 1980) ("in withdrawal of

recognition cases, like Gissel cases, bargaining orders pose a substantial risk of frustrating rather than furthering the purposes of the Act, since they may be contrary to the actual wishes of the employees").

II. The Decision Below that the Hospital Violated § 8(a)(1) of the Act Abrogates the Hospital's Right of Free Speech Protected by the United States Constitution and § 8(c) of the Act.

The second issue raised by the Second Circuit's enforcement of the Board's order is whether pure speech, in the absence of coercive conduct, and without threat or promise of benefit, can ever be an unfair labor practice under the Act. Section 8(c) of the Act confirms the constitutional prohibition against legislative restraint on speech. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Unlike Point I

above, where the Second Circuit has created a conflict between itself and the other Circuit Courts of Appeal, here the issue is largely novel: Can mere words, unaccompanied by threats or promises of benefit, and without any surrounding coercive conduct, ever constitute an unfair labor practice?

In this case the ALJ found that the evidence was unclear as to whether James was simply informing nurses that if they returned to work during the strike it would be advisable to resign union membership to avoid fines, or whether James was actually seeking resignations to cause disaffection from the Union, thereby interfering with the nurses' rights. Because the Board's General Counsel had the burden of proof on this issue, the ALJ ruled for the Hospital. ALJ Dec. A59-A61. The Board accepted the ALJ's factual findings as

to the contents of the conversations, but reversed the ALJ because it construed the nuances somewhat differently than did the ALJ. The principal difference between the Board and the ALJ on this point is that the ALJ was persuaded by circumstantial evidence that James' conversations may well have been about fines, in that issues relating to crossing the picket line and avoiding Union fines were common topics of discussion among the nurses. ALJ Dec. A61-A63. The Board did not place credence in such circumstantial evidence because of the absence of direct evidence that fines were actually discussed in the particular conversations constituting the alleged unfair labor practice. Board Dec. A118-A120.

We do not dispute the Board's factual findings on this matter. The

subtleties of interpretation that underlie the ALJ's and the Board's differing conclusions underscore why Congress, in enacting Section 8(c), gave pure speech a measure of protection from being found an unfair labor practice. It is therefore hardly surprising that pure speech, absent coercive conduct, or threat or promise of benefit, has never been found an unfair labor practice. The Board's and Second Circuit's position is that, under Section 8(a)(1) of the Act, anti-union words spoken by the employer violate the Act. Section 8(c) of the Act, however, modifies Section 8(a)(1) to the extent of expressly protecting the right of supervisors freely to express their views as long as they make no threat of reprisal or promise of benefit. The only way to reconcile the two sections is to accept the implicit distinction in

the cases between pure speech, protected by Section 8(c), and conduct, proscribed by Section 8(a)(1). See, e.g., NLRB v. Superior Sales, Inc., 366 F.2d 229, 235 (8th Cir. 1966) ("[f]or a statement to be a violation of § 8(a)(1) it must not only fall within the meaning of § 8(a)(1) but also without the protection of § 8(c)").

Only two cases have been cited by the Board for the proposition that mere speech without coercion violates the Act, and both, unlike this case, involved significant coercive conduct surrounding the speech. In NLRB v. A & S Electronic Die Corp., 423 F.2d 218, 221-22 (2d Cir.), cert. denied, 400 U.S. 833 (1970), in addition to expressing pro-union sentiments supervisory personnel actually distributed union authorization cards and urged employees to sign them. In Texaco, Inc. v. NLRB,

722 F.2d 1226 (5th Cir. 1984), in addition to expressing anti-union sentiments, supervisors actively participated in preparing an anti-union petition, and gave employees paid time off to solicit signatures. Id. at 1229. The Court expressly held: "Thus, an employer may not act by way of preference [for or against a union], but may voice preference . . . The right of expressing preference, of course, is protected by the First Amendment and § 8(c) of the Act. . . ." Id. at 1231.

Even if one looks beyond the cases relied upon by the Board and the Second Circuit, there is simply no precedent for refusing the protections of Section 8(c) and the First Amendment in a case such as this. Invariably, the cases finding an unfair labor practice on the basis of employer speech have been predicated upon either extrinsic

evidence of coercion, or on a threat or promise of benefit. Such situations involve, for example: retaliatory threats to close a plant if the union wins a certification election (e.g., Gissel Packing, 395 U.S. at 618-19; Frito-Lay, Inc. v. NLRB, 585 F.2d 62, 65 (3d Cir. 1978)); or making promises of benefits to be provided if the union loses the election (e.g., NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 282 (6th Cir. 1981)).

Where, as here, the speech itself does not embody any threats or promises, the cases consistently require proof of conduct, beyond mere speech, that shows that the speech had a coercive effect or interfered with employees' rights. E.g., NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 478-79 (1941); NLRB v. Lenkurt Electric Co., 438 F.2d 1102, 1107 (9th

Cir. 1971) ("[i]n determining whether an employer's communications constitute permissible argument or prohibited threats, the statements must be considered in the context of the factual background in which they were made, and in view of the totality of employer conduct"). Here, the Board and the Second Circuit relied solely on James' non-threatening words to find that an unfair labor practice occurred. That is a novel and unsupportable interpretation that seriously eviscerates Section 8(c), and deserves this Court's attention and correction.

Under our occasionally lopsided labor jurisprudence, unions have been left free to urge as strenuously as they wish that employees should abandon any loyalty to management. The traditional rationale for not letting employers compete just as strenuously in the

marketplace of ideas -- notwithstanding that it is a fundamental tenet of our system of liberty that free expression of conflicting views is the best path to truth -- was a presumption that free speech by management could easily be coercive, and therefore needs to be restrained. One can question whether that premise, born of the labor strife and violence of the 1930s, justifies restraints on free speech in the vastly different conditions of 1987. Be that as it may, where, as here, there is nothing at issue but an expression of opinion that it would be advisable (and good advice, at that, in view of the risk of union fines) for employees who decide to cross picket lines to resign their union membership first, there is no basis under our Constitution or Section 8(c) to find an unfair labor practice.

III. The Questions Presented Deserve Supreme Court Review Because the Decision Below Conflicts With Those of Other Circuits and Because Such Questions Are Likely to Recur.

Under Point I above we showed that, until this case, the Circuit Courts of Appeal have (i) consistently applied Gissel's reasoning to cases involving withdrawals of recognition; (ii) recognized, in light of Gissel, that to find a violation of Section 8(a)(5) on the basis of another unconnected unfair labor practice, in the face of an apparent anti-union majority, could destroy the employees' Section 7 rights; and (iii) required a causal link between the employer's unfair labor practice and the majority's disaffection from the union as a prerequisite to finding a violation of Section 8(a)(5) and issuing a bargaining order. The Second Circuit now stands

alone in not requiring a causal relationship between the employer's unfair labor practice and the majority's disaffection from the union in circumstances such as those present here.

The importance of this issue, and the need for Supreme Court attention, is emphasized by the general decline in unionization in recent years. See, e.g., "Congressional Research Service Report on Implication for Economic Policy and Labor Legislation of Decline in Union Membership," reprinted in BNA Daily Labor Report June 13, 1986, at D-1 to D-12. That trend suggests that decertification campaigns and employees' demands for withdrawal of recognition of their unions will likely increase as will events like those involved in this case.

The issue is important for a second reason: The law as it now exists in the Second Circuit places an employer in an impossible dilemma when confronted by a demand by a majority of employees that it cease treating their union as their representative. If the employer withdraws recognition, he risks violating Section 8(a)(5) on the basis of some unrelated de minimis unfair labor practice that he might not even know of at the time he is presented with the demand for withdrawal. On the other hand, if the employer goes ahead and negotiates with the union notwithstanding the employees' demand he may violate Section 8(a)(2) of the Act

by improperly favoring the union.[6] See Peoples Gas System v. NLRB, 629 F.2d 35, 37 n.3 (D.C. Cir. 1980).

The general decline of unionization also makes the Section 8(c) issue especially deserving of this Court's consideration. Unions can be expected to fight hard to retain their market share, as it were. To permit pure speech such as that involved here (which, if given the reverse meaning and spoken by the Union would plainly not

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[6] The consequences for an employer who guesses wrong can be severe. In this case, for example, the Board ordered the Hospital to make up lost contributions to Union benefit funds for a period of over two years (Board Dec. A 123) -- notwithstanding that the nurses' benefits during that period had been paid by the Hospital, not the Union funds. In effect, the Board's order as enforced by the Second Circuit requires the Hospital to incur double liability for the nurses' benefits while the propriety of the Hospital's withdrawal of recognition was being litigated.

have been an unfair labor practice) to constitute an unfair labor practice that voids the majority's anti-union preference gives incumbent unions a powerful weapon that Congress intended to withhold when it enacted Section 8(c).

Conclusion

For the reasons set forth above, the Hospital respectfully requests that its petition be granted.

April 30, 1987

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

APPENDIX TO PETITION OF MANHATTAN EYE, EAR & THROAT HOSPITAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK CITY BRANCH OFFICE

MANHATTAN EAR, EAR AND
THROAT HOSPITAL

and

DISTRICT 1199,
HOSPITAL AND
HEALTH CARE
EMPLOYEES UNION,
RETAIL, WHOLESALE
AND DEPARTMENT
STORE WORKERS
UNION, AFL-CIO

Case Nos. 2-CA-20501
2-CA-20571
2-CA-20590
2-CA-20710

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DECISION

Statement of the Case

HAROLD B. LAWRENCE,

Administrative Law Judge: This case was heard by me in New York City on the 4th, 5th, 6th, 7th and 8th days of March

1985. The frequently amended consolidated complaint is founded upon charges filed on various dates between 2 August 1984 and 6 December 1984 by District 1199, Hospital and Health Care Employees Union, Retail, Wholesale and Department Store Workers Union, AFL-CIO, hereinafter referred to as "the Union." Some 20 violations of Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act") are charged against Manhattan Eye, Ear and Throat Hospital, the Respondent, consisting in the main of prompting and assisting employees to abandon and decertify the Union, exclusion of Union representatives from access to the premises and to unit employees and refusal to discuss and negotiate certain changes with the Union. The Respondent denies commission of most of the acts alleged as wrongdoing and statutory violation. Some of the alleged conduct is admitted

subject to affirmative defenses which I have discussed in connection with the allegations to which they pertain.

The parties were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce relevant evidence. Post hearing briefs have been filed on behalf of the General Counsel and on behalf of the Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

There is no issue as to jurisdiction, the pertinent facts with respect thereto having been admitted in the Respondent's answer. The Respondent is a New York corporation which operates a hospital at 210 East 64th Street, New

York City. It grosses more than $250,000 annually and receives products valued in excess of $50,000 annually from points outside New York State. Respondent admits and I accordingly find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is now and has been, at all times material in this case, a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. General Background[1]

All of the registered nurses

---

1. The matters narrated without evidentiary comment are those facts found by me on the basis of admissions in the answer, data contained in the exhibits, stipulations between or concessions by counsel, undisputed or uncontradicted testimony and, in instances where conflicts in the testimony did not warrant discussion, the testimony which I have credited.

employed by Respondent constitute an appropriate collective bargaining unit, for which Respondent has recognized the Union as the exclusive collective bargaining representative under collective bargaining agreements since 1980.

On 13 June 1984,[2] the most recent such agreement expired without renewal and the Union commenced an economic strike. The testimony establishes that the most intractable issues of the strike, such as the Union's demand for every second weekend off, were matters of concern to ancillary service workers, but not to the registered nurses. The nurses were upset that they were compelled to lose work for that reason and matters were not helped by the Union's insistence

---

2. All dates hereinafter mentioned are in 1984 except as otherwise stated.

that the nurses not return to work until Respondent and the Union had signed a contract, even if the Union reached an agreement with the League of Voluntary Hospitals. In fact, the picket line continued in front of Respondent's hospital after the Union reached agreement with the League in late August or early September and Respondent, as of the date of the hearing, still had not been notified that the strike was officially ended. Thus, nurses could not return to work, even though agreement between the Union and the League seemed to have been reached, because the picket line continued in front of the hospital. In the few negotiating sessions which had been held prior to the commencement of the strike, nurses' concerns had received minimal attention.

On 18 July, Farideh Ajdari, a registered nurse, filed a petition to

decertify the Union. A Stipulation for Certification on Consent Election was approved by the Region on 1 August. The cards requesting decertification which the nurses signed were typed by a secretary employed by the hospital on cards which came from the hospital stationery stock. The election was scheduled for 30 August, but has never been held because of the pendency of the unfair labor practice charges filed by the Union against the Respondent which are the subject of the instant proceedings.

Both the General Counsel and the Respondent deem the strike to have ended on 29 August, although the Union has never officially declared an end to the strike. Eleanor Herbert, Director of Nursing, testified that she considered the strike over as of 29 August and counsel for the General Counsel, in her post hearing brief,

cites Herbert's testimony in support of an assertion of that effect. The picket line remained.

On 6 September, Ajdari delivered a letter dated that date to Eleanor Herbert, Director of Nursing, which read as follows:

> Dear Mrs. Herbert:
>
> Because a majority of the registered nurses at this hospital no longer want to be represented by District 1199 as our bargaining agent, I'm submitting the enclosed signed index cards which state that he/she no longer wants District 1199 as his/her bargaining agent at Manhattan Eye, Ear & Throat Hospital.
>
> Therefore, I ask management of this hospital not to negotiate anymore with District 1199 as our bargaining agent.
>
> Yours very respectfully,
>
> Farideh Ajdari, RN

On 7 September Respondent withdrew recognition from the Union, contending, as it does in these proceedings, that it had a good faith doubt as to whether the Union

represented a majority of the nurses in the unit. It followed suit on 10 October by cancelling authorization previously granted for Union membership meetings on the premises scheduled for the three shifts on 16 October because the RN division was listed in the meeting flyer along with the Guild Division and the Hospital Division, which the Union continued to represent. Union representatives who persisted in remaining on the premises on 16 October were directed to leave the premises and were arrested when they refused. New rules were promulgated limiting access to the premises.

Issues are thus presented as to whether Respondent unlawfully encouraged and assisted a decertification movement, whether it withdrew recognition of the Union on the basis of a bona fide belief that the Union no longer represented a majority of the nurses in the bargaining

unit and whether its withdrawal of recognition was tainted by commission of unfair labor practices which compromised the Union's ability to represent the nurses.

B. Supervisory of Status of Certain Personnel

Respondent admits in its answers that during pertinent times Carol Handfus was Acting Director of Human Resources; Eufemia James was a per diem relief supervisor; Fransuhi Partikoglu (also known in the hospital as Frances Partik) was head nurse; Bercuhi Oksucoglu (also known in the hospital as Suzy Oksus) was an assistant head nurse; and Catherine McDonnell was a supervisor. McDonnell testified that she had been acting as the evening supervisor since 19 February 1984. James appears, from testimony in the record, to have worked all shifts. Respondent admits that they were

supervisors within the meaning of Section 2(11) of the Act but denies that James, Partikoglu, McDonnell or Oksucoglu were acting in their roles as supervisors or on the Hospital's behalf in connection with any conduct alleged in the complaint. This denial is of little avail to Respondent, for it is well settled that an employer is bound by the acts and statements of his supervisors, whether specifically authorized or not, and therefore is responsible for unfair labor practices committed by low level supervisors. Southern Stevedoring Co., Inc., 230 NLRB 609, 615 (1977); Collectramatic, Inc., 267 NLRB 866, 871 (1983).

The facts of the case, as I have found them, show the communication by these persons to at least several nurses of a "sufficiently uniform" message, as well as a relationship to management "sufficiently intimate to

give an authoritative gloss to their statements and to cause employees to reasonably believe that they were accurately reflecting operative conditions and personnel policy." Liability under the Act therefore exists even without an actual determination of their supervisory status. See Crawford Container, Inc., 234 NLRB 851, 859 (1978). In this connection, it is to be noted that Section 2(13) of the Act expressly provides that in determining whether they acted as Respondent's "agents," so as to render Respondent responsible for their acts, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." See Collectramatic, Inc., supra.

I consider Respondent's reliance on Times-Herald, Inc., 253 NLRB

524 (1980) to be misplaced. In that case, it was observed that in order to find liability for communications such as those in the instant case, there must be some evidence that the employer has

> encouraged, authorized, or ratified the conduct or that the supervisor acted in such a manner as to lead the employees to reasonably believe that he was acting on behalf of management.

However, the situation under discussion in Times-Herald involved an employee who made an inquiry of the employer respecting decertification procedure but who was both a supervisor and a member of the unit. Since he was a member of the unit, the question of whether the Respondent was responsible for his antiunion conduct could not be resolved in the absence of evidence of encouragement and authorization. That duality of status does not exist in the present case.

C. Catherine McDonnell

The complaint alleges, and the Respondent denies, that on or about 21 July Respondent, acting through McDonnell, urged and encouraged an employee in the unit to sign a card to decertify the Union. In addition to its denial, the Respondent asserts certain affirmative defenses.

The first of these is that the conduct alleged is protected by Paragraph 8(c) of the Act. The second is that it is protected by the First Amendment to the United States Constitution. Section 8(c) of the Act provides simply that expression and dissemination of opinion shall not be deemed to be, or to be evidence of, an unfair labor practice under the Act "if such expression contains no threat of reprisal or force or promise of benefit." An analysis of the evidenced

relating to McDonnell's actions must therefore focus on the presence or absence of any coercion or promise of benefit.

The Respondent also alleged as an affirmative defense that the claim embodied in the allegation was "before the Regional Director" when the original consolidated complaint was issued on 28 November but it was not included. From this it is argued that its inclusion in the Order Amending Consolidated Complaint dated 29 January 1985 is a nullity since the period of the statute of limitations had run. Respondent arrives at this result by asserting that "the Regional Director lacked authority to revive a dismissed claim outside of the period of statute of limitations prescribed in the Act." This is coupled with an affirmative defense to the effect that the claim was

waived because the charging party did not appeal the Regional Director's dismissal of the claim on 28 November. For good measure, the Respondent asserts that the Union is estopped by its failure to appeal "and by the doctrine of laches." These two affirmative defenses (labelled the Fourth Defense and the Fifth Defense) are hereby dismissed. The failure of the Regional Director initially to include a charge in a complaint does not constitute a dismissal of the charge. Consequently, its inclusion by amendment of the complaint at a later date does not constitute "revival" of a charge already found insupportable in evidence or law.

In a Sixth Defense, Respondent asserts that the charge filed in Case No. 2-CA-20501 did not give fair notice of the claim contained in Paragraph 13(b) and the claim is therefore barred

by the statute of limitations prescribed in the Act. Counsel for Respondent advances this defense though the charge recites that Respondent "urged and encouraged an employee . . . to sign a card to decertify the Union" and the charge sets forth that the employer violated Section 8(a)(1) and (3) by discriminating in regard to terms and conditions of employment "in order to discourage membership in District 1199 and has taken other actions, including but not limited to the initiation, direction, coordination and implementation of a campaign to decertify District 1199 . . . and otherwise acted to undercut District 1199's position as bargaining representative . . ." The allegation contained in the amended consolidated complaint and the original charge are couched in practically identical

language. The relationship between the two is explicit. Accordingly, the Sixth Defense is dismissed.

On the merits, the case against McDonnell rested on the testimony of Soledad Soriano, a staff nurse on the evening shift. She testified that McDonnell, the evening supervisor, telephoned her on the evening of 21 July. Both live in the nurses' residence quarters at 210 East 64th Street; Soriano is across the corridor from McDonnell and one door down. They do not socialize, though they are on normally cordial terms. McDonnell asked Soriano if she was staying in the Union; if not, she had a card for her to sign. Soriano responded that she would do whatever she, Soriano, thought was best. At about 10 o'clock the next morning, McDonnell knocked on her door and told her to sign a card, which she

had with her. Soriano refused, saying she was not signing anything, to which McDonnell responded, "You know the score." Soriano then said she would think it over, whereupon McDonnell said, "You have only until 10 o'clock to think it over." McDonnell gave Soriano her paycheck and left.

According to McDonnell, she was asked by Brolli Narciso, a staff nurse who was working with Ajdari on the decertification drive and had accompanied Ajdari on a visit to the NLRB office in New York City on 18 July, to let Soriano know, if she saw her, that Narciso and Ajdari were stationed at the Barbizon Hotel with decertification cards. McDonnell opted to call Soriano, rather than leave conveyance of the message to chance. Her visit the following morning was solely for the purpose of delivering

Soriano's paycheck. The card she asked Soriano to sign was for the paycheck, "which is a custom when you give a paycheck."

The testimony of neither of these witnesses is free from doubt, not only because their accounts directly contradict each other with respect to matters pertinent to the issues of the case, but because subsidiary details of their testimony are burdened with doubt. For example, in McDonnell's case, it appears that the invariable practice at the hospital was to deliver nurses' paychecks at the nursing office or on the hospital floor, never in the residence, and that the nurses normally signed for receipt of checks on a yellow paper or pad, not on white index cards. Moreover, according to McDonnell, Soriano withdrew into her room without signing anything, yet she appears to

have been permitted to retain her paycheck without accounting complications. By her own testimony, McDonnell also seems to have been willing to become far more involved than requested. McDonnell testified that Narciso asked her to talk to Soriano because Narciso and Soriano were not on good terms (Narciso lived on the same floor at the residence). Narciso also asked McDonnell to call a nurse named Matthews, whom she was having trouble reaching. McDonnell went to the trouble of telephoning Soriano, rather than waiting for a chance encounter, and undertook to call Matthews even though that task was expected to be troublesome.

However, the difficulties with Soriano's testimony, on which the General Counsel relies, are much more grave. She never read the card which McDonnell supposedly asked her to sign.

The remarks she attributes to McDonnell sound ominous, but Soriano never testified that McDonnell referred to the card as a decertification card. The General Counsel contends that Soriano reasonably inferred that it was a decertification card because of a telephone conversation which Soriano claims to have had with Matthews. Soriano testified that Matthews called her and asked if she had been asked "to sign a card" and Matthews told her that McDonnell had just called her to go to the hospital to sign a card, which would then permit her to go back to work "and whatever the union is demanding they will give more than what - the rate is being given."

This testimony provides no direct or specific identification of the nature of the card which McDonnell is supposed to have asked Soriano to sign.

Further difficulty is presented by Matthews' testimony, which made it clear - emphatically - that her conversation with McDonnell had not at all been as described by Soriano and that Soriano had no basis for quoting it because Matthews never told Soriano about it. Matthews testified that in her conversation with McDonnell, McDonnell only asked her to see Narciso at the Barbizon. Matthews testified that that was the entire conversation; that McDonnell never told her that if she wanted to sign a card to get rid of the Union she should come to see McDonnell; that McDonnell never mentioned anything like that or anything about a card, and never said anything about decertifying the Union. Matthews further testified that she never spoke to Soriano about her conversation with McDonnell, never told Soriano that McDonnell had said she

had a card for Matthews to sign, and never told Soriano that McDonnell said she should get over to the hospital if she wanted to sign it. She thus gives the lie to Soriano quite directly.

At most, McDonnell is shown to have relayed messages from Narciso. The General Counsel seeks to prove that McDonnell attempted to coerce Soriano into signing a decertification card without evidence that the card which Soriano was asked to sign was a decertification card. Soriano's testimony is sharply disputed by testimony of witnesses with equal or better credibility. Aside from that, what little is proved regarding McDonnell's actions seems not to establish conduct of an illegal nature.

It adds up to a case considerably short of a preponderance of the evidence. Accordingly, I do not

find that McDonnell unlawfully solicited Soriano's signature on a decertification card. It is therefore unnecessary to consider the constitutional defense raised by the Third Defense, which is better raised in the United States District Court in any event. The Second Defense, based on Section 8(c) of the Act, is dismissed for the reason that there is no evidence that McDonnell's activity insofar as it has been proven, consisted of "[T]he expressing of any views, argument or opinion, or the dissemination thereof . . ." The defense is therefore inapplicable. The burden was upon Respondent to establish that McDonnell's actions consisted of expression of opinion, which Respondent failed to do.

D. Partikoglu and Oksucoglu

It is contended that on or about 11 July, during a dinner

conversation, Fransuhi Partikoglu (Partik) and Bercuhi Oksucoglu (Oksus) urged Monica Mitchell, a staff nurse, to resign from the Union, to affiliate with the New York State Nurses Association and to circulate a decertification petition. Mitchell testified that she entered a restaurant, saw them sitting there, asked if they were going to be there long, was invited to join them and had dinner with them. They spent 45 minutes to one hour together.

According to Mitchell's testimony, after general conversation the discussion drifted into the subject of the strike, which was set for 13 July. Partik commented that she thought Mitchell was "too classy" to be in the Union and that the nurses, being a separate group, should be in a more professional union that District 1199. She "suggested that . . . I . . . pass a

slip around to other nurses saying that you want to be out of the union." Mitchell responded that the Union had obtained benefits for the nurses, she liked it and would not be interested in passing a slip around. Oksus said, "What about the New York State Nurses Association." Mitchell answered that it was not as powerful as District 1199 and was management-oriented. The rest of the conversation pertained to matters not connected with the Union and "there was nothing else said about it. I said I wasn't interest in doing it and they didn't make any other comment either way, it was just - after that, it was just table conversation."

At the time of this conversation, Mitchell was a member of District 1199's negotiating committee, a circumstance known to both Partik and Oksus and which, in fact, was mentioned

in the course of the conversation. Counsel for the Respondent argues that this makes it implausible that Partik and Oksus would have attempted to enlist Mitchell in a decertification movement and I agree. Nevertheless, I credit Mitchell's account of the conversation. The question is whether it supports the General Counsel's allegation of violation of Section 8(a)(1) of the Act. The nature of the suggestion being made is very clear but it is not clear that there existed any element of coercion. There certainly was no explicit coercion and none appears to derive from the surrounding circumstances.

The conversation appears to have been good-humored and Respondent argues that the remark about Mitchell being "too classy" to be in the Union was made in jest. Reading it in cold

print did not reduce me to hysteria and there is no evidence that Mitchell was greatly amused by it. Remarks made in jest in the workplace have been held to be in violation of Section 8(a)(1) of the Act when they tended to be of a coercive nature. See Ethyl Corporation, 231 NLRB 431, 434 (1977). In the present case, we are dealing with a conversation among persons who, according to Mitchell's own testimony, have known each other for 12 years. Mitchell rejected Partik's suggestion immediately and reaffirmed her support of the Union discomfort. Unlike Soriano, she did not feel the need to ask for time to think. Furthermore, Mitchell did not testify that the matter of the strike or the Union was first raised by Partik or Oksus; she was uncertain as to who raised the subject. The conversation was mostly social,

having opened with inquiries by Partik and Oksus about Mitchell's children. Mitchell mentioned her union activities -- she was on the negotiating and labor-management committees -- and that her concern was having to go out on strike with the cleaning people and the other service workers. She thus practically invited the comments attributed to Partik. The word "decertification" was never used; though Mitchell had signed an affidavit for a Board investigator in which the word was used, she testified that it was not used during the conversation with Partik and Oksus. Asked if Partik or Oksus threatened her, Mitchell testified, "In no way."

Consideration of the actual statements made during Mitchell's conversation with Partik and Oksus and of the circumstances in which they were

made, taking into account the known backgrounds of all the parties to it, leads me to conclude that the remarks of Partik and Oksus did not tend to have a coercive effect. The remarks attributed by Mitchell to Partik are of the kind which fall within the protection of the United States Constitution and the provisions of Section 8(c) of the Act, as contended by Respondent in the Second and Third Defenses set forth in its answer. Though my finding in this respect precludes holding Respondent responsible for the remarks, I note also that the evidence respecting the dinner conversation leads me to conclude that Partik was not, at the time, speaking on behalf of management. The incident involved nothing more than expression of her personal opinion and was so understood by Mitchell at the time.

The allegation was not proved by a preponderance of the evidence and there was no proof of the essential element of coercion. I emphasize this point because Partik was not called by Respondent to testify regarding her remarks and no explanation for her absence was furnished. Moreover, the credibility of Oksus was undermined by the fragmentary nature of her recollection and by inherent contradictions. She testified on direct examination that it was Mitchell who raised the subject of the Union, by asserting that she felt sorry for the nurses because they could not resign from the Union without losing benefits. Despite the improbability of such a statement coming from Mitchell, Oksus also asserted that only Mitchell could have raised the subject because "I didn't know there was such a thing that

they can resign or get out of the Union. I didn't know at all." Later, she testified that she did not recall who made the statement that it was possible for somebody to resign from the Union and then, on being pressed, admitted that she herself made the statement. This lack of credibility does not, however, supply to the General Counsel's presentation the evidence necessary to support the allegations of the complaint.[3]

---

3. I reject Respondent's theory, set forth in its post hearing brief, that since, according, to Oksus, Mitchell had never before joined Partik and Oksus for a meal, her presence on this occasion must have been for the deliberate purpose of eliciting statements from them which would be violative of the Act. This suggestion of something in the nature of entrapment is sheer speculation based entirely on Oksus' testimony that Mitchell first brought up the subject of the Union.

E. Violations of Section 8(a)(1) by Eufemia James

Eufemia James is a part-time clinical nursing supervisor who also had separate private business interests and worked at a veterans hospital. It is contended that she violated the Act in the course of conversations with several nurses: that on 23 July she urged a nurse to quit the Union and affiliate with the New York State Nurses Association; that on 26 July she urged an employee to sign a card to decertify the Union; that on 27 July she urged an employee to quit the Union and offered to help the employee draft a letter of resignation; that on 9 August she encouraged an employee to resign from the Union and instructed the employee in the procedure; and that sometime during the last week of August she told an employee on the telephone that in order to return to work, she would have to

send District 1199 a letter resigning from the Union, and offered to help write the letter. The case against James rests on the testimony of Soledad Soriano, Alicia Young, Rosie Merka and Patricia Simmons.

1. Soledad Soriano

Soriano testified that James called her on the residence telephone several days after McDonnell spoke to her. McDonnell had spoken to her on the telephone on 21 July and had seen her the following morning, which fixes the date of the telephone call from James at 23 July. Soriano did not recall the time of day at which she received the call, but recounted the conversation as follows:

> She said she was calling all the Filipino nurses to go back to work because she was asked by Mrs. Herbert and Mrs. Rudan -- Mr. Rudan. And if I want to go back to work, I should contact Mrs. Herbert and if -- before I could go back to work I have to write to JoAnn

> Marshall resigning from District 1199 and then I can join the New York State Nurses Association . . . . And she finally stated that if I don't know what to do, I can contact Ms. Narciso and she will show me what to do. . . . So I said to her, "I'll just let you know when I feel like going to work."

James flatly denied having discussed the strike or resignation from the Union with Soriano. She was emphatic: it was not a matter of not remembering whether such a conversation had occurred; she knew it had not occurred. The clarity of James' memory with respect to this conversation stands out in sharp contrast to her inability to remember other conversations of critical importance to the case which are discussed elsewhere in this decision. James professed to be clear in her mind in this instance because she had a basis for recalling the conversation. She asserted that it stood apart in her memory from hundreds of telephone calls which she made in

connection with her campaign for elective office in the Philippine Nurses Association because she had spoken to Soriano by telephone previously and Soriano had once called her for real estate advice. I found that explanation irrelevant and unpersuasive. If anything, the type of conversation she was having with other nurses -- at Rudan's request -- made it inevitable that she would have discussed the strike with Soriano.

The Respondent contends that, despite the strong start of her testimony, Soriano became uncertain afterwards and was unable to state whether James told her she could or should resign from the Union. I detect no uncertainty whatsoever: she testified that James told her she "could" write to Marshall and "could not" come back to work without having done so.

2. Alicia Young

Alicia Young testified that James called her at home on 25 July and left a message to call her back at her home telephone number. Young returned the call on 26 July. In her testimony, Young quoted James to the following effect:

> In the conversation she told me that a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union. So she told me to write to Joann Marshall if I wanted to resign also from the union. . . . That's all she told me, that if I'm interested, just to resign from the union by writing to Joann Marshall and I said that I will must wait (sic) until the strike is over. . . . She said to me that maybe the strike will not be over and it will take time, so she advised me that if you are decided to send a letter, send it by certified mail to Joann Marshall. So I answered her that I'm just going to wait until the strike is over and that's all.

James called again a week later, at which time she told Young

> almost all the nurses are resigning already and this week, this coming

> week, she said that they were coming back to work and if you want to be interested to come back, you can come back any time and will arrange you how to come back. But you (sic) said that you have to resign first from the union before you can come back to work.

Though Young testified that that was the entire conversation, after reviewing a portion of an affidavit which she had furnished to a Board investigator, she testified, in addition, that James said something else:

> She said to me that I had to resign from the Union. I will write the letter to Joann Marshall or they are going to send the resignation to Joann Marshall.

When she told James she would sit out the strike, James' response was,

> Well, it's up to you, but if you want to go back to work you have to make this letter saying to Joann Marshall or you bring the letter and then we will arrange for how you do it.

Young testified that on the telephone James used the word "resign" many times: "Many times, just to write the letter that you want to resign to the union."

Respondent attacks Young's credibility on the basis of inconsistencies in her testimony respecting the number of telephone conversations she had with James and the precise statements attributable to James in each. Unquestionably, the various recountings of the conversations were not consistent in all details, but, in the main, Young's testimony was a coherent, consistent and credible account to the effect that James called her and told her that other nurses were returning to work and that she could also return if she quit the Union and that James expressed her opinion that the strike might be a lengthy one.

The Second Order Amending Consolidated Complaint adds an allegation that on or about 26 July James urged and encouraged an employee to sign a card to decertify the Union. The employee is not named, but I presume

from the alleged date that the reference is to Young. The matter is academic, for no proof of any kind was adduced in support of the allegation, whether with respect to Young or anyone else.

3. Rosie Merka

Rosie Merka, a staff nurse on the night shift, testified that during the strike James called her at home three times. On at least one of these occasions, James called from the hospital. Prior to these telephone calls she had never spoken on the telephone with James, had never socialized with her, eaten with her, discussed the Philippine Nurses Association with her, seen James outside of work or had any conversation with her beyond customary salutations and greetings.

The first telephone call was on 27 July, when James telephoned her at home in the evening. She described the conversation as follows:

> She called me and then she said I'm Mrs. James, a Filipino nurse. I was asked by Mr. Rudan to called the Filipino nurses to return to work.

Merka's account of the conversation, like Soriano's, asserts that James started with an express statement that she was calling the Filipino nurses to return to work. The balance of the conversation with Merka related to the fact that both women were Filipinos and spoke a particular dialect and it was taken up with purely personal affairs. Merka promised to call James back when she made a decision. A week later, James called her again, around noontime. She described the conversation on this occasion as follows:

> She said you're still not back to work. She said write to Ms. Joann Marshall. She's in the nursing division of 1199. If I could help you to write a letter if you need some help. . . . So she gave me the address of Ms. Joann Marshall. . . .

The third conversation took place when James called her in the

evening a week later. On this occasion the conversation went as follows:

> So she called me and then she said that--you know she said why are these Filipino nurses they are so hard headed to return to work, you know. She said, you know I'm calling again for the Filipino nurses because we're going to open another floor. So she said they are very nice. She said Mr. Rudan and Mrs. Herbert were very nice and understanding and if we ask some days off or long vacations for whatever, overtime, private duties, they will give us favors. Now this time they're asking us to return to work and we still -- we could not cooperate with them to return to work. . . . she said 1199 is asking too much and you have already good benefits without 1199.

Merka testified that during the telephone conversations she did not feel threatened or coerced and James did not make any statements indicating that her failure to come back to work would have any bad consequences. She explained the reference to writing a letter to Ms. Marshall as something James suggested to let the Union know that she was returning to work, if she so decided. The conversations were friendly in tone.

In the course of her initial testimony, Merka indicated that the remark by James about opening another floor was made in the first conversation as well. She quoted James as saying, "She said that I'm calling for you to return back to work because I want to open the floor." In later testimony, however, she asserted that what James told her was that Herbert and Rudan were simply looking for reciprocation for their past understanding and cooperation with the Philippine nurses and their special problems. No new promises were being made in order to induce them to return. James made statements about how kind Mrs. Herbert, the Director of Nursing, and Mr. Rudan, in charge of education, had been in the past when Philippine nurses requested longer vacations, wanted overtime, or wanted private duty. The witness agreed with a spoon-fed question by Respondent's

counsel which summarized the matter to the effect that James was in effect saying nothing more than that in return for past fairness to Filipino nurses, the nurses should do them a favor and come back to work. She agreed that no special treatment was promised to returnees, and James never promised anything, threatened anything or made her feel threatened.

4. Patricia Simmons

Patricia Simmons, a day shift nurse, testified that she had wanted to return to work several times but did not want to cross the picket line. In late August, she heard on the radio that the Union had arrived at an agreement with the League of Voluntary Hospitals and that it appeared that the strike was almost over. The picket line was still in front of the hospital, so she telephoned the nursing office to find out the procedure for returning to

work. James answered the telephone and told her to send a letter by certified mail to Jo-Anne Marshall to the effect that she resigned from District 1199. James dictated the format of the letter to her on the telephone. It was something like, "I, Patricia Simmons am resigning from 1199. . ." James told her that that was the procedure she had to follow to come back to work.

According to Simmons, the information given to her by James was consistent with her own understanding of what had to be done, and she was not even sure which of them first mentioned the idea of writing a letter to District 1199. She readily conceded under examination by Respondent's counsel that she was not threatened and had already decided to return to work when she placed the telephone call to the hospital which was answered by James.

5. James' Testimony

Eufemia James testified that she was on very friendly terms with Rudan, the Director of Education, who mentioned to her that the hospital was calling nurses to find out whether they were planing to return to work so that it would always know how many floors to open up. During this period in July, she was campaigning for office in the Philippine Nurses Association and making hundreds of telephone calls at her own expense from her home. Rudan asked her to inquire, when she spoke to any of the hospital's own nurses, whether they were planning to come back to work and let him know. She did this. That is her explanation for the inquiries she made.

In the course of making these telephone calls, James spoke to most of the Respondent's nurses, but was unable to say precisely how many. She testified that her practice was to

discuss Association business with them first and then ask if they had any intention of returning to work. Some of them told her that they were afraid to cross the picket line. Some said they were coming back to work. Some said they were not. She reported the responses to Rudan.

According to James, the subject of resigning from the Union only came up in conversations with some nurses and then only because they told her that they wanted to return to work but were afraid they would be fined for crossing the picket line. James insisted that on every such occasion she told them the decision was theirs to make and that she never told anyone to resign from the Union or that they could not come back to work unless they quit the Union. She testified that some of the nurses said that they would like to go back to work

> and they said that they heard that they -- they're afraid to be fined and they said that some of their co-workers told them that they have to resign from the union. And I told them that I know of some nurses that came back to work and have resigned to protect themselves. But I said it was their decision to make.

The campaign in the Philippine Nurses Association related to an election for officers and the board of directors of the Association which had originally been scheduled for the last Friday of July but had been postponed to November. The General Counsel considers it suspicious that though the rescheduling was accomplished before 27 July, James continued making the telephone calls. As they would have undoubtedly been made ultimately in any case, I am not persuaded that her continued telephone activity is any evidence that the calls were really being made to induce the nurses to return to work and to resign from the Union.

6. Analysis and Conclusion

The applicable general principle of law is that employers may not solicit employees to withdraw from union membership, but they may bring to employees' attention their right to resign from the union, may supply information as to the procedure for doing so and may even supply forms. The employer may provide same in response to employee request or furnish it unsolicited. Ace Hardware Corporation, 271 NLRB No. 178 (1984); Perkins Machine Co., 141 NLRB 697 (1963); Cyclops Corporation, Tex-Tube Division, 216 NLRB 857 (1975). The employer's involvement must be limited and statements by the employer must be free of threat and coercion or promise of benefit. The critical factor is not the actual effect or lack of effect of the employer's statements on the employees' actions or frame of mind, but whether the

employer's statements are of a type which tend to interfere with the employees' free exercise of their rights under Section 7 of the Act. Choctawhatchee Electric Cooperative, Inc., 274 NLRB No. 84 (1985).

An employer would not seem to violate the Act if he makes no attempt to ascertain whether employees will avail themselves of the rights to which they have been educated by the employer, does not assist in more than purely ministerial fashion, "or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." R.L. White Company, Inc., 262 NLRB 575, 576 (1982). The kind of conduct proscribed is that in which an employer does the mailing, supplies stationery and postage, retains copies of the letters

of resignation in its files, prepares the letter, and summons employees to executive offices to sign the letters. KDI Precision Products, Inc., 176 NLRB 135, 138 (1969). The conduct must not amount to solicitation by the employer, by words and actions, of union resignations or to such a marked indication of the employer's favor of such action that a situation would be created in which "employees would tend to feel peril in refraining from signing the petition." Foothills Food, Inc. d/b/a Erickson's Sentry of Bend, 273 NLRB No. 11 (1984), sl. op., p. 5.

Questions about employee strike intentions unaccompanied by threats, promises or other coercive conduct are not per se unlawful, "but must be judged in light of all of the relevant circumstances." Mobile Home Estates, Inc., 259 NLRB 1384 (1982) (interrogation respecting employee's

willingness to cross picket line in event of strike accompanied by statement that without union employer could afford to pay better wages).

Applying these criteria to the most extreme conduct by James as to which there is credible testimony, it is apparent that there are some respects in which it may fairly be argued that she overstepped the bounds of permissible conduct. A review of her testimony and that of the four nurses who testified to their conversations with her leaves no doubt that she called and made inquiries respecting their intentions with respect to the strike at the behest of Respondent's management; made references to resignation from the Union and in at least some instances associated resignation with their return to work; made follow-up telephone calls to ascertain what they intended to do; and began some of the conversations with the

flat statement that she was calling them back to work.

The most serious questions about James' conduct are raised by the evidence respecting her conversations with Soriano and Merka. Though Respondent asserts, in its post hearing brief, that "the choice was clearly left up to Merka whether or not to accept James' help" in drafting a letter to the Union, it is not always so clear from the testimony how much of an option was given to her by James or with respect to what aspect of the matter she was told an option existed. In the case of both Soriano and Merka, James placed the telephone calls and began the conversations with the flat statement that Rudan wanted the nurses to come back or that she was calling the Filipino nurses back to work. In the case of Soriano, express mention was made of resignation from the Union and

it was made in connection with the procedure for returning to work. In the conversation with Merka, only letter-writing was suggested (according to Merka's testimony) without mention of resignation from the Union. James offered assistance in writing the letter.

Furthermore, to the extent that James' denials conflict with the testimony of Soriano, Merka and Young, I tend to credit the testimony of the nurses because I found many of James' responses to questions evasive. For example, when asked if she used Jo-Anne Marshall's name in her conversation with Merka, she replied that she could not remember; she conceded that she uttered Marshall's name once or twice, but could not remember which conversations were involved because she had spoken to hundreds of nurses. She had the same memory problem for the same reason with respect to critical facets of her conversation with Simmons.

James' testimony was disputed by the nurses on a number of points. On cross-examination as to who first mentioned resignation from the Union in the telephone conversations, James testified, with some lack of clarity, that one Filipino nurse, whose identity she could not recall, mentioned that she had been told by others that some nurses were avoiding Union fines by quitting the Union before returning to work. James did not claim that any such information was volunteered by Soriano, Young, Merka or Simmons, though both Simmons and Soriano testified that they had that information when they called the hospital and spoke to James. In Simmons' case, the matter of who first brought up the question of writing a letter cannot be resolved, for both Simmons and James professed to lack any sure recollection. James testified that she remembered nothing except that she

left the decision entirely to Simmons, as she had with all of the nurses to whom she had spoken. That is strange testimony, because Simmons was one person who demonstrably had no irresolution about what she wanted to do.

James' stated reason for making the inquiries was that Rudan had told her that a lot of nurses were crossing the picket line and returning to work but, because the Hospital did not know who was coming in, it was difficult to plan and open a floor. She testified that he asked that she make the survey so that they could plan. The nurses who testified indicated that it was the other way around: James told them they were needed because the Respondent wanted to open another floor of the hospital.

However, in most other instances of conflict between James' testimony and that of other witnesses,

either their credibility seemed evenly balanced on the particular point or the point itself was immaterial. For example, at least one nurse said she got Marshall's address from James, while James denied knowledge of the address of District 1199; however, if she had furnished the address it would have been within the permissible limits of employer assistance to employees seeking to withdraw from or decertify a union. In addition, it has to be noted that James' testimony regarding the reasons for her making the inquiries not only presents a highly plausible explanation, but is corroborated by Herbert's testimony that it was necessary to find out who was coming in because of the erratic behavior of some nurses, who came in for a day or two and then dropped from sight on account of the picket line.

I find that, on the entire record, all that has been established by a preponderance of the credible evidence is that James made numerous telephone calls during the months of July and August; that some of the calls were placed by her to members of the unit; that she asked those nurses whether they planned to come to work despite the strike; and that she spoke to some of them more than once. No other fact is established by a preponderance of the evidence in the record which, together with the foregoing, would support a finding that James' conduct placed Respondent in violation of the Act.

Bearing in mind that the nurses to whom James spoke knew that management would have liked nothing better than a mass defection from the Union, James' communication to them that management wanted them back at work said nothing that they did not already know. The

practical realities and the context in which the conversation took place cannot be ignored. It has been observed that ". . . any notification by a company to its employees of their right to withdraw from a union carries with it at least the notion that the company 'wants' the employees to withdraw." Cyclops Corporation, Tex-Tube Division, 216 NLRB 857, 858 (1975).

There are two major respects in which the charges have not been proved by a preponderance of the credible evidence.

The first is a failure to establish the precise meaning of James' remarks in the conversations in which resignation is shown to have been discussed. In those conversations, it is not at all clear whether James was pushing for defection from the Union or simply explaining that, in order for a nurse to cross the picket line and

return to work without becoming subject to a Union fine, the procedure she had to follow was to resign from the Union before coming back to work. None of the statements proved to have been made by James were so explicit that, on their face, they required one or the other of these two possible constructions.

The burden was therefore placed on the General Counsel to adduce proof which would have invested James' statements with a meaning which would have made them unlawful. The burden was not met.

In Soriano's case, James told her that before she could come back to work, if she wanted to, she would have to resign from the Union. There is no evidence in the record as to whether this remark is to be construed as an assertion that no return to work would be permitted by the employer except upon resignation from the Union, or that

return to work was impossible because the Union had a picket line in front of the hospital and a fine for crossing it could, as a practical matter, be avoided only by quitting the Union. Such clues as are contained in the record are not helpful to the General Counsel's case. At one point, in response to a direct question, she testified that James told her she could resign from the Union. The conversations were held against a backdrop of nurses quitting and returning to work through the picket line, with many of them angry at the Union. James' remarks may easily and reasonably be construed as a follow-up on the picket line situation, for Soriano testified that she had already heard, prior to receiving the call from James, that some nurses who had crossed the picket line had resigned from the Union first. It was a matter of common knowledge. Soriano and the other nurses

who testified were all concerned with the danger of incurring a Union fine if they crossed the picket line, and resignation from the Union had become an increasingly well-known means of avoiding the penalty, even on the part of some who favored Union representation. In any event, the fact remains that the worst reading of James' statement that the evidence supports would be that in order to come back to work they had to resign from the Union, if they wished to come back to work before the end of the strike without paying a fine to the Union. The decision was clearly left to the nurses, without coercion.

James' suggestion that Soriano join the New York State Nurses Association has not been shown to be anything other than suggestion to her by James of an alternate professional association if Soriano elected to quit

the Union. There is no evidence to support construction of the statement as recommendation of a different and preferable collective bargaining representative. (I did not credit James' denial that she had made the suggestion and I do not believe that the evidence submitted by Respondent that James has not been a member of the Association since October 1982 is probative as to whether or not she made the suggestion to Soriano.)

Taking Young's testimony at face value, the most extreme statement James is found to have made is the assertion that the strike could possibly be lengthy. That is a statement protected by Section 8(c) of the Act as a statement of opinion containing no threat of reprisal or force or promise of benefit, and, moreover, was made with respect to a point which is essentially ancillary to the issues of this case.

In Young's testimony, it is not made clear whether James simply told her to write to Jo-Anne Marshall if she wanted to resign, or told her she had to resign, or that she had to resign to come back under any circumstances, or even whether James only had reference to the problem of getting across the Union's picket line without incurring a Union fine.

In Simmons' case, as I have noted, the matter of who first raised the question of writing a letter cannot be resolved. However, nothing in Simmons' testimony suggests culpable conduct.

In contrast to Young's testimony that James used the word "resign" many times, Merka testified that James never told her to resign from the Union in any of the three telephone conversations that they had. She testified as follows:

JUDGE LAWRENCE: Did you ask her why you had to write to Ms. Marshall?

THE WITNESS: No, she told me. She just told me, you know, to -- she just give me the name of Ms. Marshall to write to her in order to return to work.

It is possible to interpret that testimony only as a statement clearly inferring some kind of linkage between writing to the Union and returning to work. The nature of the linkage, however, is altogether unproven. Returning to work was the only possible subject a letter could be written about, but whether that entailed a statement of resignation from the Union by Merka and the true objective of such a resignation are matters on which there is no decisive evidence in the record.

The second respect in which I find failure of proof on a critical issue is the failure to establish the

existence of coercion by a preponderance of evidence.

In none of the communications between James and any of the four nurses whose testimony I have just reviewed is there any statement which can reasonably be construed as coercive in tone, intent or probable effect. I am excluding from consideration their unanimous testimony that they felt no coercion or pressure as well as the fact that, except for Simmons, who, on her own initiative had called the hospital and reached James, they did not, in spite of James' statements, quit the Union and return to work. The statements made were devoid of coercion. James told the nurses that the Hospital administration would like the nurses to return to work and that <u>if</u> they wanted to return, which the nurses all knew could not be done without crossing the picket line and incurring a fine, the hospital administration would

help them get letters out to the Union. Such assistance would have been purely ministerial and within the permissible limits established by Board precedents. There were no promises and no threats.

I have taken into consideration the emphasis which James is alleged to have placed on the probable duration of the strike and on the return of many nurses to work after quitting the Union, and I have considered the fact that James made more than one telephone call to two of the nurses. Nevertheless, it is clear from the witnesses' testimony that throughout the conversations the option was left with them whether to quit the Union and return to work or sit out the strike.

Merka testified that her conversations with James were friendly in tone.

Simmons' testimony patently demonstrated the absence of coercion on the part of James in her case.

As a final note, the absence of testimony from anyone else should be noted. There were approximately 100 nurses in the unit, but the General Counsel's case rested on unclear testimony from only a few of them. Accordingly, I find no violation of Section 8(a)(1) of the Act by reason of James' conversations with any of the four nurses who testified.[4]

F. Aid to the Decertification Movement

1. The Union Decertification Fact Sheet

The Respondent prepared a fact sheet laying out the procedures for Union decertification. The Respondent contends that it was not prepared for

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4. Respondent's Second and Third Defenses are hereby dismissed as inapplicable to the alleged violations involving James. James' remarks were not in the nature of "views, argument, or opinion" within the protection of Section 8(c) of the Act and the First Amendment to the Constitution of the United States.

circulation among the nurses, but for the edification of Herbert. Herbert testified that upon the commencement of the strike on 13 July she began receiving telephone calls from irate nurses asking her about decertification and she asked Carol Handfus to "research it."

The document supposedly produced by Handfus, a two-page memorandum entitled "Union Decertification Fact Sheet," reads like a call to arms. It begins with a declaration that employees who no longer wish to be represented by the Union and want to remove it "have the right" to do certain things. There follows four paragraphs outlining the procedure. Methods of preserving anonymity on the part of signers are set forth and reassurance is given that the NLRB keeps such names secret. It is noted, in tone of alarm augmented by underscoring, that

the signatures must be submitted "to the NLRB before a new contract for the RN's is signed. Once a new contract is in effect, decertification will be impossible. . ."

The memorandum concludes in the following fashion:

> (4) The law (National Labor Relations Act) says you are not required to have a union representing you if you do not wish to be represented by the union.
>
> You can be sure that the federal law stands behind you and that you are protected in a decertification effort by the power of the Federal Government and the courts.

Herbert testified that the pronoun of the second person was employed in the memorandum to facilitate her answering telephone inquiries by simply reading from it. I do not credit that explanation because it is belied by the bellicose tone of the memorandum. All that is proved, however, is that Handfus prepared a memorandum for

Herbert's use which on its face exceeds the permissible limits of employer assistance to employees seeking information about decertification and which sounds like a summons to combat. There is no proof that the memorandum was distributed or its contents read over the telephone or otherwise disseminated. The only evidence that it ever found its way outside of Herbert's office is her testimony that she momentarily forgot an envelope containing it in a meeting room and testimony by Mary Callan, a staff nurse, that she found of copy of it under her door. Callan testified that she made no inquiries as to how it got there. Her testimony is suspicious. If credited, however, it suggest that the memorandum was intended to be, and to some extent was, distributed, but does not prove that it was in fact distributed by the Respondent. Ajdari did not see it until

later. It is possible that someone, knowing Callan's anti-union feelings, to which she testified, felt that delivering a copy to her would be more effective than a wholesale distribution. In fact, it was. Callan testified that she was delighted to get it and went right down to the Board office to file a petition, only to discover that Ajdari had already been there. The identity of that person and his or her connection to Respondent, however, are unproved.

The circumstances of the delivery of the memorandum to Callan remain a mystery, which means that the General Counsel has not established a violation by a preponderance of the evidence. Speculation cannot be substituted for evidence. There is no evidence that any persons other than Handfus, Handfus' secretary (who typed it), Herbert, Callan and, later, Ajdari

ever read it. There is no evidence that it was read over the telephone to anyone by Herbert. There is no evidence that Respondent acted on it, whatever the intentions may have been. There was no evidence to explain why Respondent would have instigated Callan to file a decertification petition if Ajdari had already done so. And all of this remains true if Callan's testimony is not credited.

2. Meeting of 28 August

On 28 August, at 1 o'clock in the afternoon, Francis Carling, an attorney for the hospital, addressed a meeting of 25 or 30 nurses in the Doctor's Lounge. The complaint alleges that the Respondent "discriminatorily granted aid . . . to those of its employees seeking to decertify the Union by granting paid time off from work to its employees in the unit . . . to facilitate their attending" the meeting

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"wherein decertification of the Union was discussed."

The organizer of the meeting was Farideh Ajdari, the staff nurse who had filed the petition for decertification on 18 July (having been one of the nurses who inquired of Herbert respecting the procedure). She testified that she got permission to use the Doctor's Lounge on 28 August and invited Carling to address the meeting.

With respect to the object of the 28 August meeting, Respondent asserts in its post hearing brief that it was a meeting of, by and for the nurses to discuss the recent blocking of the election. The General Counsel contends that it was a meeting called by anti-Union nurses for the purpose of asking Carling about decertification and their other legal options. That is, in effect, a concession that it was the nurses' own meeting. The evidence shows

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that the nurses did not draw fine legal distinctions, but sought assistance on the whole problem of getting back to work. Decertification inevitably was mentioned. The election had been blocked. According to Ajdari, the organizer of the meeting,

> . . . we wanted to do something else because we were so desperate that there's nothing being done and they already delayed the election, and the majority of nurses already crossed the picket line. They wanted to know what is their options and if the law would permit them to do something else to proceed in their -- because they were very dissatisfied with the union.
>
> So, we started to do something else. I called some of my friends and we talked about it together and that's what we did. We started collecting more signatures.

In short, with the election blocked by reason of the filing by the Union of the unfair labor practice charges, the nurses were advised by Carling to request withdrawal of recognition of the Union.

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Counsel for all parties stipulated at the hearing that Respondent permitted the nurses to attend the meeting at 1 o'clock, did not dock them for overstaying the lunch hour and the subject of decertification of the Union was discussed at the meeting. Parvan Valentini, a staff nurse who attended the meeting, described it. She testified that approximately 20 nurses attended. Ajdari introduced Carling and stated that he was there to answer any question that they had. Carling stated that he had been invited by Ajdari and that management had nothing to do with the meeting, and that he was there to answer any questions they had about the strike. Valentini attributes a statement to Carling to the effect that they could get the Union out if 51% of the nurses came back and resigned from the Union. He repeated the statement when Valentini pointed out

that not all of the nurses who had resigned in order to return to work without being fined actually wanted the Union out. He also stated that he expected the strike to last for a long time because Marshall had not kept an appointment for a negotiating session. He then left. The meeting ended at about 2 o'clock.

Valentini also testified that on the morning of 28 August James conferred with Partik and they rearranged the lunch hour of the registered nurses whom Partik supervised in order to enable them to attend the meeting. Her testimony in this regard is uncontroverted, for Partik was not called as a witness by Respondent and James, who testified both before and after Valentini, was not asked about it. Herbert's explanation was that at the time there was no normal scheduling. Schedules were disrupted by the strike

and the nurses took their lunch and breaks as and when they were able to while they worked the excessively long hours necessitated by the strike, and noone was actually excused from duty to attend the meeting. In a way, Valentini's testimony and Herbert's testimony are in accord that no nurse was released from duty to attend the meeting, for had they been released there would have been no need to rearrange the lunch hour.

I find that James and Partik made arrangements to facilitate nurses' attendance at a meeting called by anti-Union nurses to find out what they could do legally about getting rid of the Union. In doing so, however, James and Partik were not inducing any persons to attend the meeting nor seeking to influence decisions on issues which were on the agenda of the meeting. They were making it easier than it might otherwise

have been for the persons who wished to attend the meeting during their lunch hour to exercise the rights guaranteed them by Section 7 of the Act. The fact that some nurses may have overstayed the lunch hour and were not docked is immaterial, for in failing to clock the nurses to the minute, the Respondent has not been shown to have given disparate treatment to them as compared to the treatment which it had customarily accorded to persons attending Union meetings. Under the circumstances, I perceive no violation of the Act.

G. Alleged Offenses Under Section 8(a)(5) and (1)

The General Counsel contends that Respondent violated the Act by express withdrawal of recognition of the Union on 7 September and by actions which it thereafter took inconsistent with the recognition to which the Union was entitled.

1. Withdrawal of Recognition

On 7 September, Dr. George A. Sarkar, the Executive Director, sent a letter addressed to Jo-Anne Marshall, the Executive Vice President of Distirct 1199, withdrawing recognition of District 1199 as bargaining agent for the Registered Nurses and advising that Respondent would not attend the negotiating session scheduled for 10 September. The letter set forth the following bases for the withdrawal of recognition: (1) as of 27 August, while the strike was still in progress, a majority of the Registered Nurses had crossed the picket line and returned to work; (2) the belief that many, if not all, of the nurses who did so had resigned from the Union; (3) receipt by Dr. Sarkar, on 7 September, of a "petition signed by a majority of the bargaining unit nurses" requesting management to withdraw recognition; (4)

the belief based on the foregoing facts that District 1199 no longer represented a majority of the Registered Nurses employed at the hospital.

At least one statement contained in the letter appears to be technically contrary to fact, for there appears not to have been one document signed by the nurses in the form of a petition, but rather a submission to Herbert by Ajdari of index cards signed by nurses which she had been collecting under cover of the previously quoted letter dated 6 September setting forth that because a majority of the nurses no longer wished to be represented by District 1199, she was submitting the cards and requesting that management not negotiate further with the Union.

The General Counsel attacks the Respondent's action on the grounds that it was taken without foundation in any reasonable belief based on objective

considerations and that the withdrawal was tainted because it was done in a context of unfair labor practices committed by Respondent. The General Counsel's position is based more on argument that on evidence. The General Counsel raised questions regarding a number of details, some of which were immaterial, but resolved none of them by presentation of evidence supporting the allegations of the complaint. She pointed to the fact that the presence of four or five per diem nurses who were on duty at the hospital may have had some effect of calculation of a majority, without offering proof as to what the effect was. She pointed out that Herbert may not have had all for the cards in her possession on 6 September, when Herbert and Sarkar conferred and the decision to withdraw recognition was made. There was uncertainty in Herbert's testimony regarding the actual

number of cards there were in her possession, on that date and the next day, when the letter went to the Union. There was also evidence that she received cards thereafter, one of which was dated as late as 30 September. These questions were raised inconclusively and do not affect the thrust of the weight of the evidence. At the same time the General Counsel raises questions such as these, and asserts, in the post hearing brief, that Respondent acted too hastily, it is also set forth that "Respondent was anticipating the presentation of the cards by Ajdari and wasted no time withdrawing recognition. When Herbert was presented with the cards she told Ajdari, 'I was very surprised that this has been <u>accomplished</u> . . .'" Underscoring was supplied by the General Counsel for emphasis. What it emphasizes, in my estimation, is the

glee and sincerity with which Herbert accepted Ajdari's count of the cards and took them to Sarkar's office. In doing so, she patently acted in the belief that the fervently desired majority in favor of withdrawal had been achieved. She happily issued a memorandum to all the nurses announcing what she regarded as good news. Herbert's elation at Ajdari's "accomplishment" is the most eloquent evidence of her sincere conviction that the Union had lost its majority.

Ajdari testified that she had worked under great anxiety that she might not get enough signatures before negotiations were scheduled to resume on 10 September. She stopped collecting as soon as she thought she had a majority. When she had collected the decertification cards and filed them with the Board, she had stopped at 30. She testified that in the period before

the election (scheduled for 30 August) she and her friends did not try to persuade anyone else how to vote "because we had already majority of the nurses . . . expressing their feeling that they do not want to stay in the Union and that they had crossed the picket line already and they wanted to come back to work." After the election was postponed, she estimated 54 or 55 nurses were back at work, though she was uncertain as to the exact number. She began collecting signatures on cards requesting withdrawal of recognition when nurses began calling her and pressing for some action before negotiations resumed on 10 September. (This time she bought the index cards and Mary Callan typed them.) Five other nurses helped her get signatures. She testified they collected signatures over a period of two or three days, stopping at 51 because that was a majority and 10 September was drawing close.

Ajdari testified she was committed to the cause of getting rid of the Union deeply enough to have paid the cost of the meeting room at the Barbizon Hotel out of her own pocket. She and Herbert both believed that a majority of the nurses had signed cards requesting withdrawal of recognition. (I note that in this instance she referred to 51 cards as a majority whereas she had referred to 30 cards as a majority in connection with the decertification petition, but I ascribe this to loose use of the word, "majority." She obviously was referring to the legal numerical requirements in each of these two separate situations.)

I credit Herbert's and Ajdari's testimony respecting their belief and reject the General Counsel's contention that it was incumbent upon Herbert to check the current payroll to make sure of the majority. I am not dissuaded

from this conclusion by Herbert's admission of uncertainty about the exact number of cards in hand when Sarkar signed the letter to the Union. The evidence is substantial that Ajdari, Herbert and Sarkar, who relied on Herbert when he signed the letter withdrawing recognition, believed that a majority for withdrawal of recognition had been achieved by Ajdari. Their behavior -- Sarkar's inquiry of Herbert as to the existence of a majority, her assurance that it was there, the discussion of where to keep the cards, the decision to put them in the safe and the telephone call to counsel, who at the time was in London -- all of these actions were behavior consistent with their asserted belief that the majority had been achieved, regardless of what the number was. Sarkar took the kind of precautions which would have been expected to be taken by a person in his

position who contemplated such an important and legally momentous step. I find that Respondent's withdrawal of recognition was based upon a bona fide belief that a majority in favor of withdrawal of recognition existed among the nurses and that a majority of the nurses were already back at work. There is no evidence, in fact, that as of 7 September a majority had not been achieved.

Since I have not found that unfair labor practices were committed prior to 6 September, no question is presented as to whether Respondent's withdrawal of recognition was "tainted" thereby.

2. Actions by Carol Handfus on 12 September and 9 October

The Respondent, in its answer, admits allegations that "Respondent, by Handfus, on or about September 12, 1984, instituted wage increases, pension,

health and insurance plans" and that Respondent "on or about October 9, 1984, instituted a new grievance procedure." In each case, Respondent has alleged that at the time, recognition of the Union had been withdrawn. Since no collective bargaining agreement was in effect covering the nurses and Respondent had withdrawn recognition of the Union in the bona fide belief that a majority of the nurses in the unit favored such action, there was no legal impediment to unilateral implementation of wage and benefit arrangements or to the promulgation of new grievance procedures. The alleged actions by Respondent were not in violation of the Act.

3. Cancellation of Union Meetings scheduled for 16 October

On 1 October, Respondent sent District 1199 a letter confirming reservation of the second floor

conference room "for your Chapter Meeting for the Hospital and Guild Division being held on Tuesday, October 16, from 8:00 a.m. to 5:00 p.m." Written confirmation was requested.

On 10 October, Handfus sent the Union a second letter, referring to the first letter and to conversations which had preceded it. Recalling that the authorization which had been granted had been limited to meetings of the Hospital and Guild Division employees, whose bargaining units were still represented by the Union, the letter concluded, "Despite these very specific conditions, I learned today that leaflets were distributed throughout the Hospital announcing a meeting including the R.N.'s. Under these circumstances, the Hospital has cancelled your reservation and no space will be made available to you at this time."

The General Counsel's contention that the Respondent thereby violated Article V, Section 2 of the collective bargaining agreement, which carried forward into the renewal negotiation period, and thus violated tne Act, is based on the presupposition that recognition had been unlawfully withdrawn. As I have found that it was not unlawfully withdrawn, the section is inapplicable. However, it would have provided little support for the Union's position in any event, for the terms of the collective bargaining agreement did not allow the Union the access which was demanded by the Union after its expiration. Article V, Section 2 provided as follows:

> 2. A representative of the Union shall have reasonable access to the Employer for the purpose of conferring with the Employer, delegates of the Union and/or Employees and for the purpose of administering this Agreement. Where the Union representative finds it necessary to enter a department of

> the Employer for this purpose, he/she shall first advise the personnel office or the head of the department or his/her designee in person, as the Employer shall state. A delegate intending to go to a department other than the one he/she represents shall follow the above procedure. Such visits shall not interfere with the operation of the Employer.

The Union scheduled meetings with employees in bargaining units other than that of the registered nurses, for all of the shifts, on 16 October. Arrangements were discussed with Handfus in advance. They were then confirmed in writing. It was clearly understood that the nurses were not to be involved in the meetings, yet the Union persisted in circulating flyers inviting them to the meetings and Union representatives began approaching the nurses in the common areas of the hospital to solicit their support. There is no conflict in the evidence respecting the Union's patent violation of the understandings reached with respect to the meetings. Under the

circumstances, the Respondent did not violate the Act by insisting upon the Union's adherence to the understanding previously reached and withdrawing the authorization for the use of space in the hospital.

4. Confrontation on 16 October

I mentioned the fact that the Union did not respond to the Respondent's letter of 10 October. Three organizers showed up for the meetings on 16 October. They entered the cafeteria and conversed with both the registered nurses and members of the units whom they continued to represent. They were invited to leave the cafeteria, and did, but they congregated in the lobby and refused to leave for more than seven hours despite repeated requests from hospital personnel and the police, who were summoned by the Respondent toward the end of the day. The police arrested them. Following

this imbroglio the Union filed additional charges, resulting in new allegations that, without prior notice to the Union and without affording the Union an opportunity to negotiate as exclusive representative of the Respondent's registered nurses, Respondent, acting through Handfus, instructed the Union representatives to leave the cafeteria and promulgated a rule requiring prior permission before they entered the cafeteria or lobby area of the hospital; that Respondent "by its agent" instructed Union agents to leave the hospital and caused the arrests of "Union organizers" by the police when they refused to leave; that Respondent, acting though Barbara DeVito, a personnel department representative, promulgated a rule restricting access by Union representatives to the library; and that these actions were taken to prevent the Union representatives from

meeting with and representing Respondent's registered nurses.

The General Counsel contends that the Respondent's actions contravened the reasonable access clause of the collective bargaining agreement and past practice of the parties, and that the access provisions survived the expiration of the agreement. At the same time, the General Counsel argues that the grievance and arbitration procedures are not available to Respondent, and therefore Respondent must answer in these proceedings alleging unfair labor practices, because those provisions do not survive the expiration of the collective bargaining agreement. (The General Counsel raises an additional argument in the post hearing brief to the effect that the Respondent's actions violated "the Master Agreement which was in effect on October 16, 1984," but there is no

allegation pertaining to same in the complaint and no evidence was offered respecting the agreement to which reference is made.)

The Respondent does not dispute most of these allegations, but denied the allegations that the cafeteria is open to non-employees of the hospital, that the Union was required to get prior permission to enter the lobby, that the Union represented the nurses, that the Respondent's actions were taken without prior notice and that the Respondent's actions violated Section 8(a)(1) of the Act. While arguing that no collective bargaining agreement was in effect at the time and that "an employer is not obligated to allow a union whatever access it may demand" the Respondent argues that the Union should have resorted to the grievance and arbitration procedures provided for in the collective bargaining agreement. In

its post hearing brief, Respondent chastises the Union for concededly trying to maintain contact with the registered nurses and trying to compel Respondent to deal with the Union as their representative, ignoring the Union's contention that it still represented the nurses and was entitled to recognition as their bargaining agent.

My finding that the Respondent withdrew recognition on 7 September in the bona fide belief that the Union no longer represented a majority of the registered nurses in the bargaining unit leads inexorably to the conclusion that Respondent acted lawfully in promulgating the rules complained of without prior notice to, or consultation with, the Union. The Union organizers' entry upon the premises without making prior arrangement with the hospital administration was a violation of the access clause of the collective

bargaining agreement, and in the period following its expiration and the withdrawal of recognition, the Union had even less right to be on the premises. The Union's position in this regard is not helped by the testimony of Lisa Heelan, a Union organizer, that she told Handfus at the beginning of October that more than 51% of the nurses had signed a petition requesting the Union to represent them, for Heelan also testified that Handfus asked to see it and she refused to show it to her.

The General Counsel attempted to counter the Respondent's argument that exclusion of the Union representatives from the cafeteria was lawful with testimony by Heelan that she had been subjected to verbal abuse by a hospital official for using the cafeteria on 28 August. I find no relevancy therein to the issue of Handfus' right to exclude them in

October and I note also that there is insufficient evidence respecting that hospital official's status and authority and the overall effects of his conduct to make Heelan's testimony meaningful and material.

Testimony by Mary Ann Steel, another organizer, to the effect that she and Heelan were approached by a security guard in the cafeteria one Friday earlier in October and told that he had been instructed to remove them from the premises, similarly relates to an event in October, after withdrawal of recognition.

The General Counsel contended that the cafeteria was, in fact, open to the public. The testimony is in conflict on that point. However, the only evidence that persons other than employees used the cafeteria, other than certain specific persons conceded to have been allowed to use it by

Respondent (contractors and the hospital's ladies' anxiliary) consists of Steele's testimony that on 16 October there were three ladies in fur coats sitting in the cafeteria at lunchtime. There was no evidence as to who they were, so their presence does not support an argument that the place was a public cafeteria. I credit Herbert's testimony that the cafeteria is not open to the general public and that there is a sign on the door saying, "Employees Only." She further testified that the only persons who use the cafeteira other than hospital staff were contractors working in the building and the women's auxiliary and that the nurses have instructions that the patients' families are to be told that the cafeteria is not a public facility and is not available for their use.

The hospital lobby is, of course, an area used by patients,

visitors, doctors, hospital personnel and others having business with the Respondent. Respondent denies having promulgated any rule excluding its use by Union representatives. The testimony of Steele and Heelan leads me to credit the denial. Steele's testimony concerning events on 16 October was to the effect that on that date she met Heelan and Diana Thomas, another organizer, in the lobby. Between 7:00 a.m. and 7:30 a.m., they went to Handfus' office to let her know their whereabouts in the institution, presumably in accordance with the procedure called for by Article V, Section 2 which I have previously quoted. They said they were going to the cafeteria and "that if we intended to go or enter any department, we would inform her which is customary and that's per the contract." Handfus told them again that she should be informed where

they were going, but at that point they had no plans to enter any particular department. They went to the lobby to await the arrival of Jo-Anne Marshall and another Union official, and then they all went to the cafeteria. At lunchtime, Handfus approached them there and announced "that the cafeteria was off limits to us."

No statement by Handfus is quoted which prohibits their use of the lobby. Heelan testified as follows respecting the statement made by Handfus, in the present of Diana Thomas and Mary Steele:

> Q. Did you have a conversation -- Did Ms. Handfus speak with you in the cafeteria?
>
> A. Yes, she did. She came down and said that in the future we would need permission to be in the cafeteria, you know, and that we really should not be in the lobby.

The distinction between access to the cafeteria and access to the lobby is

explicit in the very statement made by Handfus. There is a self-evident difference between the reference to the undesirability of, rather than the prohibition against, loitering in the lobby. There is, therefore, no evidence that a rule against Union representatives' use of the lobby was announced.

What Heelan's testimony does establish is that loitering in the lobby was warned against, notwithstanding which the Union officials returned to the lobby, after unsuccessfully attempting to seek Sarkar, and remained there the entire afternoon. At the end of the afternoon, Handfus came down to the lobby with counsel for the Respondent, who demanded that they leave. When they refused, he called the police. Steele, Heelan and Thomas were arrested at about 6:30 p.m.

Though the Union still represented other hospital employees, the testimony leaves no doubt that the organizers who refused to leave the lobby on the afternoon of 16 October were there for the sole purpose of contacting the nurses as they entered and left the building. Recognition of the Union as the representative of the nurses having been expressly withdrawn about five weeks before and the hospital lobby not being a public place, the Union organizers should have conducted their business outside the building. They were arrested, not because of their violation of a rule promulgated to the effect that they could not enter and remain in the lobby, but because they were refusing to leave a private building at an hour when the hospital offices were closing and the responsible officials of the Respondent were leaving for the day.

I find that no rule was promulgated with respect to presence of Union personnel in the hospital lobby. The Act was not violated by the promulgation of a rule excluding Union organizers from the cafeteria and the hospital library or by the summoning of police and the causing of the arrest of the organizers who refused to leave the lobby. That these actions were not taken to prevent the Union representatives from meeting with and representing Respondent's registered nurses in a lawful manner is apparent from Steele's testimony that on the afternoon of the 16th of October, when Handfus met with them and with Jo-Anne Marshall and another Union official, Handfus offered them the use of office space in the hospital. According to Steele, they considered the offer very generous, but did not accept it pending consultation with higher Union officials.

Conclusions of Law

1. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

ORDER[5]

The complaint is dismissed.

Dated: Washington, D.C. 16 August 1985

Harold B. Lawrence
Administrative Law Judge

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5. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adoped by the Board and all objections to them shall be deemed waived for all purposes.

280 NLRB No. 11 New York, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANHATTAN EYE, EAR
AND THROAT HOSPITAL

and Case 2--CA--20501
2--CA--20571
2--CA--20590
2--CA--20710

DISTRICT 1199, HOSPITAL
AND HEALTH CARE
EMPLOYEES UNION, RETAIL,
WHOLESALE AND DEPARTMENT
STORE WORKERS UNION,
AFL--CIO

DECISION AND ORDER

On 16 August 1985

Administrative Law Judge Harold B. Lawrence issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint in its entirety, finding that the Respondent did not violate Section 8(a)(1) as alleged and did not violate Section 8(a)(5) and (1) by withdrawing recognition from the Union and thereafter unilaterally instituting changes in employees' terms and

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[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

conditions of employment. The judge dismissed the 8(a)(5) and (1) allegations based on his finding that the Respondent had a good-faith doubt of the Union's majority status at the time of the withdrawal of recognition and that it occurred in a context free of unfair labor pratices. The judge concluded that the Respondent was thereafter privileged to change unilaterally employees' terms and conditions of employment. As explained below, we disagree with the judge's dismissal of the allegations that the Respondent, through Supervisor James, violated Section 8(a)(1) by soliciting employees to resign their union membership, and further disagree with his dismissal of the allegations that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and thereafter unilaterally

changing certain terms and conditions of employment.[2]

The record shows that the Union had represented a unit of approximately 101 registered nurses at the Respondent's hospital since 1980. The parties' most recent collective-bargaining agreement expired on 13 June 1984,[3] and the Union commenced an economic strike on 13 July. On 18 July Farideh Ajdari, a registered nurse, filed a petition seeking to decertify

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[2] While the judge dismissed all of the 8(a)(1) allegations, exceptions were filed only to his dismissal of the allegations that Supervisor James solicited employees to resign their union membership, that the Respondent unlawfully distributed a union decertification fact sheet, and that the Respondent unlawfully granted its nurses paid time off to attend a union decertification meeting. We note additionally that no exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by restricting the access of union representatives to the hospital.

[3] Hereafter, all dates refer to 1984.

the Union. An election was scheduled for 30 August, but it was postponed because of the filing of the unfair labor practice charges. Subsequent to the postponement of the election. Adjari gathered new cards from 51 nurses which indicated that they no longer wished to be represented by the Union. Ajdari presented these cards to the Respondent's director of nursing, Herbert, on 6 September and on the following day the Respondent notified the Union that it was withdrawing recognition based on the following factors: a majority of nurses had crossed the picket line and returned to work; the Respondent's belief that many, if not all, nurses who did so had resigned from the Union; a petition signed by a majority of the nurses requesting management to withdraw recognition. Around 12 September the Respondent implemented a wage increase

and pension, health, and insurance plans and in October instituted a new grievance procedure.

At the hearing, four of the Respondent's nurses testified concerning the allegation that the Respondent's admitted supervisor, James, had solicited employees' resignations from the Union. Thus, nurse Soriano testified that James phoned her at her residence in July and indicated that she was calling on behalf of the Respondent's director of nursing, Herbert, and director of education, Rudan, to ask the Filipino nurses to return to work. Soriano testified that James said, inter alia, "Before I could go back to work, I have to write to Joann Marshall[4] resigning from District 1199 and then I can join the

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[4] Marshall is an official of District 1199.

New York State Nurses Association." Soriano replied: "I'll just let you know when I feel like going to work." Nurse Young testified that James phoned her around 26 July and said that "a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union." Young added that James "told me to write to Joann Marshall if I wanted to resign also from the union . . . [and] send it by certified mail." Young responded: "I'll just going to wait until the strike is over and that's all." Young testified that James phoned her again a week later and told her that "almost all the nurses are resigning already . . . that they were coming back to work and if you want to be interested to come back, you can come back any time . . . but you have to resign first from the union before you can come back to

work." Young replied, "I'm not coming back to work until the strike is over." Nurse Merka testified that James phoned her at home around 27 July indicating that she "had been asked by Mr. Rudan to call the Filipino nurses to return to work." Merka responded that, "I could not answer you right now. I don't understand what's going on." James called Merka a second time about a week later. Merka testified that James remarked that "you're still not back to work" and told Merka to "write to Ms. Joann Marshall." Merka testified that James said that "if I need some help to write, she could help me to write the letter that I will no longer be a member of 1199." Merka said that she and James did not discuss the possibility that the Union might try to fine or punish workers if they crossed the picket line. Nurse Simmons testified that she called the hospital toward the end of

the strike because she wanted to know the procedure for returning to work. Simmons spoke with James who told her "that I should write a letter to Joann Marshall . . . that I resign from 1199 and send it certified letter." James gave Simmons the format for the letter resigning her membership. Simmons also testified that James did not mention anything about being fined if she did not resign from the Union. Simmons said she did not remember who raised the topic of resignation.

The judge found that "to the extent that James' denials conflict with the testimony of Soriano, Merka, and Young, I tend to credit the testimony of the nurses because I found many of James' responses to questions evasive."[5] In those other instances where the judge did not specifically

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[5] James' testimony is detailed in the judge's decision.

credit the employees' testimony over that of James, he found either that "their credibility seemed evenly balanced or the point itself was immaterial." Thus, at no point was James herself affirmatively credited by the judge. Nevertheless, as noted above, the judge concluded that the Respondent, through James, had not violated Section 8(a)(1) by soliciting resignations from the Union. He found the testimony insufficient to establish this allegation in several respects.

Preliminarily, the judge concluded that the General Counsel failed "to establish the precise meaning of James' remarks in the conversations where resignation was discussed." He found it unclear whether James "was pushing for defection from the Union or simply explaining that, in order for a nurse to cross the picket line and return to work without becoming subject

to a union fine, the procedure she had to follow was to resign from the Union before coming back to work." The judge also concluded, erroneously, that Soriano and all the other nurses who testified were all concerned with incurring a fine if they crossed the picket line. In this regard we note first that neither Merka, Simmons, Young, nor Soriano testified that James' remarks concerning resignation from the Union occurred in the context of a discussion of the procedure for returning to work without incurring a union fine. In fact, Merka and Simmons each testified that the possibility of fines was not discussed in their conversation with James. The testimony of Young and Soriano is devoid of any indication that James' remarks were raised in this context. Moreover, James herself denied having discussed the topic of resignation with Soriano. We

further note that, contrary to the judge's assertions, there is no evidence that Soriano and all the other nurses who testified were concerned with incurring a fine if they crossed the picket line. In light of the nurses' clear testimony regarding James' statements to the effect that they had to resign their union membership before returning to work and the absence of any testimony that James' remarks occurred in the context of a discussion about the avoidance of union fines, there is no basis for concluding that James merely was explaining the procedure for avoiding union fines.[6]

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[6] The judge characterized Soriano's testimony in this matter: "I detect no uncertainty [in Soriano's testimony] whatsoever: she testified that James told her she 'could' write to Marshall and 'could not' come back to work without having done so." And, the judge described Young's testimony in a similar

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The judge additionally concluded that the General Counsel failed to establish the existence of coercion by a preponderance of the evidence. In this regard, we note that an employer does not violate the Act merely by providing employees with information on how to resign from the union "as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." R. L. White Co., 262 NLRB 575, 576 (1982). Contrary to the judge, we find that James'

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> fashion: "Young's testimony was a coherent, consistent and credible account to the effect that James called her and told her that other nurses were returning to work and that she could return if she quit the Union."

conversations with the employees went beyond the mere providing of information and constituted unlawful solicitation of resignation from the Union. Thus, as noted above, it is clear from the testimony here that James solicited resignations from the Union and conditioned return to work on resignation from the Union. Additionally, James evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work and in some instances offered assistance. James explicitly stated that she was calling on behalf of her superiors. James thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership. Erickson's Sentry of Bend, 273 NLRB No. 11 (1984). In so doing, James' conduct, aimed at causing disaffection from the Union, clearly tended to interfere with the employees'

free exercise of Section 7 rights and was unlawful interference, contrary to the judge, regardless of whether there is evidence that James actually achieved a coercive effect. Amason, Inc., 269 NLRB 750 fn. 2 (1984), enfd. mem. 758 F.2d 648 (4th Cir. 1985). Thus, contrary to the judge, we find that James' conduct was not merely "ministerial" assistance proffered to the nurses[7] and that the Respondent, through James' conduct, violated the Act.

[7] The judge also noted that only 4 of the approximately 100 nurses in the unit testified concerning James' remarks. We note that, although James may have confined her unlawful conduct to only four employees, this does not make the conduct any less unlawful. Nor does it satisfy the Respondent's burden of establishing that its asserted objective considerations arose in an atmosphere free from coercion in support of its affirmative defense of good-faith doubt of the Union's majority status. We note also in this regard that the judge apparently did not consider the

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Having found this violation, we further find that the Respondent's asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union. Therefore, the withdrawal of recognition, as well as the Respondent's later unilateral changes in employees' terms and conditions of employment, violated Section 8(a)(5) and (1). See Craftool Mfg. Co., 229 NLRB 634 (1977), and cases cited therein. We also shall provide an

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testimony of nurse Parvan Valentini which was proffered in support of another allegation. Valentini which was proffered in support of another allegation. Valentini testified that she called James on 19 August and asked about the strike situation. Valentini testified that James told her that "if you wish to come back to work, you have to resign from the Union."

Order which remedies the violations found herein.[8]

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[8] In ordering the Respondent to make whole the employees for losses suffered by reason of its implementing new pension, health, and insurance plans, we note that the record is unclear whether the new plans were substitutes for preexisting benefit plans and whether any losses were incurred by this conduct. We shall order that the employees be made whole for such losses, if any, they may have incurred, and that the Respondent make the contributions to benefit trust funds, if any, which would have been made but for the Respondent's unilateral institution of pension, health, and insurance plans. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to

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ORDER

The National Labor Relations Board orders that the Respondent, Manhattan Eye, Ear and Throat Hospital, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from District 1199, Hospital and Health Care Employees Union, Retail, Wholesale and Department Store Workers Union, AFL--CIO, as the exclusive collective-bargaining representative of its registered nurses.

(b) Unilaterally instituting wage increases, pension, health, and

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> the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional adminstrative costs, etc., but not collateral losses. Merryweather Optical Co., 240 NLRB 1213 (1979).

insurance plans, and a new grievance procedure.

(c) Unlawfully encouraging or soliciting employees to resign from the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time registered nurses employed by Manhattan Eye, Ear and Throat Hospital at its

facility located at 210 East 64th Street, New York, New York, but excluding all other employees, guards and supervisors as defined in the Act.

(b) On request, restore the terms and conditions of employment in existence prior to the unlawful unilateral changes and make whole the employees for any losses suffered by reason of the unlawful unilateral changes and make contributions to the benefit trust funds, if any, which would have been made but for the Respondent's unilateral institution of the pension, health, and insurance plans.

(c) Post at its facility in New York, New York, copies of the attached notice marked "Appendix."[9]

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[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations not specifically found herein are dismissed.

Dated, Washington, D.C. 30 May 1986

Wilford W. Johansen,
Member

Marshall B. Babson,
Member

James M. Stephens,
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 6th day of February one thousand nine hundred and eighty-seven.

PRESENT:

HON. J. EDWARD LUMBARD,

HON. LAWRENCE W. PIERCE

HON. FRANK X. ALTIMARI

Circuit Judges,

- - - - - - - - - - - - - - - - - - - -x

NATIONAL LABOR RELATIONS BOARD,

Petitioner, ORDER

86-4147

MANHATTAN EYE, EAR AND THROAT HOSPITAL,

Respondent,

LOCAL 1199, DRUG, HOSPITAL & HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Intervenor.

- x

Petitioner has applied to enforce an order issued against respondent, the Manhattan Eye, Ear and Throat Hospital ("the Hospital"), requiring the Hospital to cease and desist from certain unfair labor practices and to bargain with District 1199, Hospital and Health Care Employees Union.

Upon consideration whereof, and finding that there is substantial evidence on the record to support petitioner's determination, we grant the application to enforce its order.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

HON. J. EDWARD LUMBARD,

HON. LAWRENCE W. PIERCE,

HON. FRANK X. ALTIMARI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of March one thousand nine hundred and eighty-seven

---

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. No. 86-4147

MANHATTAN EYE, EAR AND THROAT HOSPITAL,

Respondent,

LOCAL 1199, DRUG, HOSPITAL & HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Manhattan Eye, Ear and Throat Hospital,

Upon consideration by the panel that heard the appeal, it is

ORDERED that the said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

BEST AVAILABLE COPY

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No.

Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Respondent, Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO, In Opposition to Petition for Certiorari

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Counter Statement of Questions Presented for review.

1. Whether substantial evidence in the record as a whole supports the National Labor Relations Board's finding that the petitioner violated Section 8(a)(1) of the Act by soliciting employees to resign from the respondent Union?

2. Whether the National Labor Relations Board abused its discretion in finding that the petitioner's unfair labor practices tended to undermine the respondent Union's majority status and that a bargaining order was an appropriate remedy in light of the petitioner's failure to affirmatively show that its conduct did not affect the loss of Union support?

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No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1986

MANHATTAN, EYE, EAR & THROAT HOSPITAL,

Petitioner,

-against-

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF RESPONDENT, LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO, IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

In this proceeding, the Manhattan, Eye, Ear and Throat Hospital ("Hospital") seeks review of the Second Circuit's enforcement of an order of the National Labor Relations Board ("Board") requiring the Hospital to cease and desist from unfair labor practices and to bargain with Local 1199, Drug, Hospital And Health Care Employees Union, RWDSU, AFL-CIO ("Union").

The Board's order was based on its finding that the Hospital committed an unfair labor practice when it solicited resignations of registered nurses from the Union and conditioned the return of the nurses to their jobs on their resignation from the Union. The Board found that the Hospital created an atmosphere wherein employees would tend to feel imperiled in maintaining their Union membership and that the Hospital's conduct clearly tended to interfere with the employees' free exercise of their rights

under the National Labor Relations Act ("Act").

The Board also found that the Hospital's withdrawal of recognition from the Union violated Section 8(a)(5) of the Act (29 U.S.C. §158 (a)(5)). The Board rejected the Hospital's asserted good faith doubt of the Union's continued majority status on the grounds that the Hospital had not met its burden of showing that its doubt arose in an atmosphere free from interference aimed at causing disaffection from the Union.

In its order granting the Board's application for enforcement, the Second Circuit found that "there is substantial evidence on the record to support [the Board's] determination." A132.*

The Second Circuit's enforcement of the order is not in conflict with other

* References preceded by "A" are to pages in petitioner's appendix submitted with the petition for a writ of certiorari.

circuits as the rule in withdrawal of recognition cases is that if an employer engages in conduct which is aimed at causing disaffection from the union, and which tends to have that effect, the employer must affirmatively show that its unlawful conduct was of a technical nature or did not cause the union to lose majority support.

In the case at bar, the Hospital failed to carry its burden, the Board so found, and the Second Circuit properly upheld the Board's determination.

A. The Board's finding of facts.

1. Background

Since 1980, the Union represented a unit of approximately 101 registered nurses at the Hospital. On June 13, 1984*, the

* Unless otherwise indicated, all dates are 1984.

parties' most recent collective bargaining agreement expired, and the Union commenced an economic strike on July 13. A112. On July 18, nurse Adjari filed a petition seeking to decertify the Union. The decertification election was scheduled for August 30.

2. Supervisor James solicits employees to resign from the Union.

On July 23, approximately one week after the strike began, supervisor James, who was campaigning for office in the Phillipine Nurses Association, telephoned nurse Soriano and indicated that she was calling, on behalf of Director of Nursing Herbert and Director of Education Rudan, to ask the Filipino nurses to return to work. A35, A114. Soriano testified that James said,

> "[b]efore I could go back to work, I have to write to Joann Marshall* resigning from District 1199 and then I can join the New York State Nurses Association." A114-15.

---

* Marshall was an official of the Union.

On July 26, James spoke with nurse Young. According to Young, James phoned her at home and said that

> "a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union." A115.

Young also testified that James told her to

> "write to Joann Marshall if I wanted to resign also from the Union...[and] send it by certified mail." A115.

One week later, James phoned Young again and told her that

> "almost all the nurses are resigning already...that they were coming back to work and if you want to be interested to come back, you can come back any time...but you have to resign first from the union before you can come back to work." A115-16.

On July 27, James telephoned nurse Merka at her home and stated that she "had been asked by [Director of Education] Rudan to call the Filipino nurses to return to work." A116.

Approximately one week later, James again called Merka and remarked, "you're

still not back to work," and told Merka to "write to Ms. Joann Marshall." Merka testified that James stated:

> "[I]f I need some help to write, she could help me to write the letter, that I will no longer be a member of 1199." A116.

On August 19, nurse Valentini called the nursing office and asked about the strike situation. A124. Valentini testified that James told her that

> "if you wish to come back to work, you have to resign from the union." A123. n.7.

Toward the end of the strike, nurse Simmons called the Hospital to find out the procedure for returning to work. Simmons spoke with James, who told her that

> "I should write a letter to Joann Marshall...that I resign from 1199 and send it certified letter." A116-17.

Simmons further testified that the format of the letter of resignation was dictated to her by James. A117.

James testified that during July Director of Education Rudan asked her to inquire of the Hospital's striking nurses whether they were planning to return to work and to report back to him. James testified that in the course of her campaign for office in the Philippine Nurses Association, she made hundreds of telephone calls from her home to nurses throughout the city. In the course of making these telephone calls, James spoke to approximately 15 to 20 of the Hospital's Filipino nurses, but was unable to say precisely how many. A47. She denied telling anyone to resign from the Union or not to return to work unless they quit the Union. A48.

The Administrative Law Judge did not find James' testimony credible and held:

> "A review of her testimony and that of the...nurses who testified to their conversations with her leaves no doubt that she called and made inquiries respecting their intentions with respect to the strike at the behest of

> Respondent's management; made references to resignation from the Union and in at least some instances associated resignation with their return to work; made follow-up telehone calls to ascertain what they intended to do; and began some of the conversations with the flat statement that she was calling them back to work." A53-54.*

Despite this finding, the Administrative Law Judge dismissed the complaint on the ground, inter alia, that James' conduct did not constitute coercion under Section 8(a)(1) of the Act. A67.

3. The decertification election is postponed; the Hospital withdraws recognition.

The decertification election scheduled for August 30 was postponed because of the filing of unfair labor charges by the Union. A113.

Subsequent to the postponement of the election, nurse Adjari gathered cards from 51 nurses which indicated that they no longer wished to be represented by the Union.

---

* The Board adopted the Administrative Law Judge's credibility findings. A110, n.1, A117-18, A120, n.6.

A113. The unit represented by the Union consisted of 101 nurses. A112. Thus only enough cards were obtained to represent a bare majority of one. On September 6, Adjari presented the cards to Director of Nursing Herbert. On September 7, the Hospital notified the Union that it was withdrawing recognition based on the following factors: a majority of nurses had crossed the picket line and returned to work; the Hospital's belief that many, if not all, nurses who did so had resigned from the Union; a petition signed by a majority of the registered nurses requesting the Hospital to withdraw recognition. A113.

Subsequent to the withdrawal of recognition, on or about September 12, the Hospital put into effect a wage increase and new pension, health and insurance plans and in October instituted a new grievance procedure. A114.

4. The Board's decision and order.

Based on the foregoing facts, the Board determined that the Hospital violated Section 8(a)(1) of the Act:

> "Contrary to the judge, we find that James' conversations with the employees went beyond the mere providing of information and constituted unlawful solicitation of resignation from the Union....[I]t is clear from the testimony here that James solicited resignations from the Union and conditioned return to work on resignation from the Union....James evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work and in some instances offered assistance. James explicitly stated that she was calling on behalf of her superiors. James thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership. Erickson's Sentry of Bend, 273 NLRB No. 11 (1984). In so doing, James' conduct, aimed at causing disaffection from the Union, clearly tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference...regardless of whether there is evidence that James actually achieved a coercive affect. Amason, Inc., 269 NLRB 750 fn.2 (1984) enfd. mem. 758 F.2d 648 (4th Cir. 1985)." A121-23 (emphasis supplied).

The Board also concluded that the Hospital failed to demonstrate that its

asserted objective considerations for withdrawing recognition arose in an atmosphere free of coercion. A123,n.7. Thus, having found that the Hospital engaged in unlawful conduct aimed at dissipating Union support, the Board determined that the Hospital's withdrawal of recognition and its unilateral changes in the terms and conditions of employment violated Sections 8(a)(5) and (1) of the Act. A124.

The Board issued an order requiring the Hospital to cease and desist from the unfair labor practices and from interfering with, restraining, or coercing employees, in any like or related matter, in the exercise of the rights guaranteed them under Section 7 of the Act (29 U.S.C. §157). Additionally, the Board ordered the Hospital, on request, to bargain with the Union and embody any understanding reached in a signed agreement; to restore, on request, the terms and conditions of employment in existence prior to its unlawful unilateral changes; to make

the employees whole for any losses incurred by reason of those changes; and to post an appropriate remedial notice. A126-29.

On February 6, 1987, the Second Circuit granted the Board's application for enforcement of its order. A131-33. The court, in a summary order, found there was substantial evidence in the record to support the Board's determination. A132.

Summary of Argument

Point I below demonstrates that the applicable standard of review of a Board bargaining order is whether substantial evidence in the record as a whole supports the Board's factual determination. Equally important, where the Board finds an unfair labor practice, the courts give special respect to the Board's determination as to the effect of those practices and to the measures required to remedy such practices.

Point II below demonstrates that the Board's finding that the Hospital

committed an unfair labor practice by soliciting employees to resign from the Union is supported by substantial evidence. We show that the Board correctly found that the Hospital's conduct was coercive and interfered with the employee's free exercise of Section 7 rights, and thus, the Hospital's actions in soliciting Union resignations were neither pure speech nor an expression of an opinion protected by Section 8(c) (29 U.S.C. §158(c)) of the Act.

Point III below demonstrates that the Board was permitted to draw an inference that the Hospital's unlawful conduct tended to undermine the Union's majority strength. Consequently, it was incumbent upon the Hospital to affirmatively demonstrate that its actions did not, in fact, have such effect. Since the Hospital offered no such proof, the Board properly entered a bargaining order.

P O I N T I

The standard of review.

In reviewing orders of the Board, the courts are guided by certain well-established standards.

First, it is well-settled that the Board's findings of fact are conclusive if supported by substantial evidence in the record as a whole. When the Board's findings are supported by substantial evidence, the reviewing court

> "may [not] displace the Board's choice...even though the court would justifiably have made a different choice had the matter been before it de novo."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

Second, where an unfair labor practice has been found, the courts will defer to the Board, particularly where the record is silent, as to "the actual impact of the employer's unfair labor practices." Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971).

Third, as the Court held in NLRB v. Gissel Packing Co., 395 U.S. 575, 612, n.32 (1969), the Board's choice of remedy in unfair labor practice cases must be given special respect by reviewing courts. As the Court there held, the appropriate remedy for unfair labor practices affecting the union's majority status is for the Board to determine

> "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of [the Act] the Board draws on a fund of knowledge and experience all its own and its choice of remedy must therefore be given special respect by reviewing courts."

Accord International Association of Machinists v. NLRB, 311 U.S. 72, 82 (1940) ("It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged."). See also Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

P O I N T I I

Substantial evidence in the record as a whole supports the Board's finding that the Hospital violated Section 8(a)(1) of the Act by soliciting employees to resign from the Union.

It is well-settled that an "[e]mployer's activities which are calculated to erode employee support for the union violate Section 8(a)(1)." NLRB v. Triumph Curing Center, 571 F.2d 462, 470 (9th Cir. 1978); accord NLRB v. Deutsch Co., 445 F.2d 902 (9th Cir. 1971), cert. denied, 405 U.S. 988 (1972).

The courts have consistently held that "[i]t is unlawful under Section 8(a)(1) 'for an employer...to induce employees to sign any form of a union repudiating document.'" NLRB v. Triumph Curing Center, supra, 571 F.2d at 470; NLRB v. Birmingham Publishing Co., 262 F.2d 2, 7 (5th Cir. 1958). Accord NLRB v. Proler International Corp., 635 F.2d 351, 354 (5th Cir. 1981). See also NLRB v. S & H Grossinger's, Inc., 372

F.2d 26 (2d Cir. 1967); Texaco, Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984).

In NLRB v. Triumph Curing Center, supra, the Ninth Circuit enforced a Board order finding a violation of Section 8(a)(1) under circumstances which directly parallel those of the instant case:

> "Ford [a low level supervisor] called a striking employee, Mei Yuk Wan and asked her if she wanted to return to work. Wan replied affirmatively. The next day Ford told her she would have to withdraw from the Union to return to work. Ford explained to Michael Wan, Mei Yuk's son, how his mother must send a registered letter of withdrawal to the Union."

Id. at 469. The court held that those conversations and other "similar treatment" encountered by two other employees "represent the type of promises of economic benefit and employer assistance to secure union repudiation which are prohibited by the Act." Id. at 470-71.

Similarly, the Board held in Sedloff Publications, Inc, 265 N.L.R.B. 962

(1982), that an employer violated Section 8(a)(1) when it conditioned the return to work of striking employees upon their withdrawal from the union.

In the case at bar, the Board similarly found the Hospital had solicited union resignation. The Board based its findings on the following acts of James: (1) she solicited resignations from the Union (A122); (2) she conditioned return to work by striking employees on resignation from the Union (id.); (3) she offered to assist employees to write a letter of resignation from the Union (id.); (4) she provided specific wording to be used in the letter of resignation (A117); (5) she instructed employees as to the Union officers to whom letters of resignation should be sent (A114); (6) she evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work (A122); (7) she told employees that she was calling on behalf

of management (A122); (8) she created a coercive environment wherein employees would feel imperiled in maintaining their Union membership. Id.

On these facts, the Board found that the Hospital engaged in conduct aimed at causing disaffection from the Union and that such conduct tended to interfere with the employees' free exercise of Section 7 rights. A122-23.

On the record before it, the Second Circuit properly concluded that the Board's determination was supported by substantial evidence.

The Hospital contends, in its petition (P29)*, that in order to sustain an unfair labor practice charge in the instant case, the Board must find that the statements made by James constitute a threat or coercion

* References preceded by "P" are to pages in the Hospital's petition for a writ of certiorari.

But Section 8(a)(1) of the Act makes it unlawful for "an employer to interfere with, restrain or coerce employees in the exercise of ... Section 7 rights." In Texaco, Inc. v. NLRB, 722 F.2d 1226, 1233 (5th Cir. 1984), the court held that

> "[i]t is not necessary for an employer to threaten, coerce, or promise benefits to the employees for its conduct to violate §8(a)(1). 'Interference'in the terms of the statute is enough."

In the present case, the Board, affirmed by the Second Circuit, found that James' conduct, aimed at causing disaffection from the Union,

> "clearly tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference." A122-23.

This finding was consistent with the findings of other circuits in the face of similar activity. NLRB v. Triumph Curing Center, 571 F.2d 462 (9th Cir. 1978); Texaco, Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984). Because

the Hospital's conduct constituted unlawful interference, it was not "pure speech" as claimed by the Hospital and neither protected by the First Amendment nor by Section 8(c) of the Act.* See NLRB v. Gissel Packing Co., 395 U.S. 575, 616-619 (1969).

P O I N T I I I

The Board did not abuse its discretion in finding that the Hospital's unfair labor practices tended to undermine the Union's majority status and that a bargaining order was an appropriate remedy in light of the Hospital's failure to affirmatively show that its conduct did not affect the loss of Union support.

In the case at bar, the Board found that the Hospital violated Section 8(a)(1) of the Act by soliciting resignations from the

* It should be noted that the Hospital's contention that its conduct was protected by Section 8(c) and the First Amendment was rejected by the Administrative Law Judge (A69, n.4), but the Hospital did not raise this claim before the Board by way of exception, or in opposition to the exceptions of the General Counsel or the Union. Thus, this issue is not properly before the Court. See Woelke & Romero Framing Co. v. NLRB, 456
[footnote continued on next page]

Union, conditioning the return to work of nurses on their resignations from the Union and offering assistance to nurses in drafting letters of resignation, and that the Hospital thereby created an atmosphere wherein the nurses would feel imperiled in maintaining their union membership. A122. Given the nature of these unfair labor practices, the Board was permitted to draw an inference that they tended to undermine the majority strength of the Union. Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971). See also National Cash Register v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974); NLRB v. Noll Motors, Inc., 433 F.2d 853 (8th Cir. 1970), cert. denied, 402 U.S. 906 (1971).

Since such an inference was appropriate in light of the Hospital's

[footnote continued from previous page] U.S. 645, 665-666 (1982); Detroit Edison Co. v. NLRB, 440 U.S. 301, 311-312, n.10 (1979); Garment Workers v. Quality Manufacturing Co., 420 U.S. 276, 281, n.3 (1975). We believe that the Board will more fully address this point in its brief.

violations of the Act, the Hospital was required to produce evidence affirmatively showing that its conduct did not, in fact, contribute to the Union's loss of majority support. Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 177 (4th Cir. 1981) ("An employer may avoid a bargaining order by showing that... [its] unfair labor practices did not significantly contribute to ...a loss of majority...."). Accord NLRB v. NuSouthern Dyeing and Finishing, Inc., 444 F.2d 11, 16 (4th Cir. 1971). See also National Cash Register Co. v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974) ("The existence of an unfair labor practice prior to the refusal to bargain interjects an element of uncertainty about whether the employer thus caused the possible loss of majority. But if it is shown the unfair labor practice did not significantly contribute to the loss of status, the employer may avoid a bargaining order.").

These cases are relied on by the Hospital in the petition (P25) in support of its argument that the Board failed to find a nexus between the Hospital's unfair labor practice and its withdrawal of recognition from the Union. These cases stand, however, for the proposition that where an employer commits one or more unfair labor practices which tend to undermine union support, the employer has an affirmative duty to demonstrate that its unlawful conduct did not, in fact, contribute to the loss of such support. Here, the Board explicitly found that the Hospital's conduct "clearly tended to interfere with the employees' free exercise of Section 7 rights...." (A122-23) and that the Hospital failed to satisfy its "burden of establishing that...[the loss of union support] arose in an atmosphere free of coercion...." A123, n.7.

In the instant case, the Hospital failed to produce any evidence that its conduct did not significantly contribute to

the loss of the Union's majority status. In fact, the Hospital did not produce any of the 51 nurses who signed cards indicating disaffection from the Union to testify that they were not the subject of the same type of phone calls from James as were the five nurses who testified and that they were not induced to reject the Union by the Hospital's unlawful conduct. See Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 178 (4th Cir. 1981) (holding that the employer was improperly barred from calling a witness to testify that she and other union members who signed a petition for termination of representation were not affected by the employer's unfair labor practices).

The case at bar is distinguishable from Daisy's Original, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972), relied on by the Hospital (P22,23,28) wherein the court held that a bargaining order was not warranted where the unfair labor practices were merely

technical violations of the Act which did not tend to dissipate the Union's majority and did not prevent a fair decertification election. Here, the unfair labor practices were serious, were directly aimed at causing disaffection from the Union and tended to have that effect. Compare NLRB v. Carilli, 648 F.2d 1206, 1217 (9th Cir. 1981) (Daisy's Original, Inc. was distinguished on the ground that violations there "were merely technical violations of the Act which did not dissipate the Union's majority...[whereas here] the unfair labor practices were more numerous and more serious...."). See also Hotel, Motel and Restaurant Employees v. NLRB, 785 F.2d 796, 800 (9th Cir. 1986), cited by the Hospital (P25), where the court affirmed the Board's finding that the unfair labor practice of the employer, namely denial of union access to the kitchen areas of the restaurant, was "not of such a character as to either affect the Union's status, cause

employee disaffection, or improperly affect the bargaining relationship itself."

The case of Peoples Gas Systems, Inc. v. NLRB , 629 F.2d 35 (D.C. Cir. 1980), relied on by the Hospital (P28) is also distinguishable on its facts. The circuit court stated those facts as follows:

> "The inititial refusal to bargain occurred seven years ago, in a context that suggests the company was proceeding in good faith, though in violation of the law. We have no way of knowing in fact whether the employees were in favor of the union at that point, though we recognize the presumption that they were. Two years later, the union requested an election, which was conducted in an atmosphere free from coercive unfair labor practices and lost decisively. Five more years have passed since then, during which inevitable employee turnover has occurred. If any of these facts were altered, we would be more willing to defer to the Board....If the Company's violation appeared to be in bad faith, or were accompanied by other unfair labor practices, the deterrent effect of a bargaining order would be more important. ... Given the facts of this case,...we must conclude that a bargaining order would be an unreasonable and unwise remedy...."

Id. at 50 (emphasis in original).

Among other distinguishable features, Peoples Gas involved a decisive union loss in a fair election. The case at bar involves an employer's claim of a one card majority.

The Board did not abuse its discretion in determining the remedy for the Hospital's unlawful conduct, its findings of fact are supported by substantial evidence in the record as a whole and there is no conflict between the Second Circuit's enforcement of the Board's order and the decision of other circuits.

C O N C L U S I O N

The petition for a writ of certiorari should be denied in all respects.

Dated: Mineola, New York
June 1, 1987

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the National Labor Relations Board properly concluded that petitioner's alleged "good faith doubt" that the union continued to enjoy majority support was tainted by the coercive acts of one of petitioner's supervisors.

2. Whether employer statements that tend to coerce employees in the free exercise of their rights with respect to union representation are protected by either Section 8(c) of the National Labor Relations Act, 29 U.S.C. 158(c), or the First Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A131-A133) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A109-A130), including the opinion of the administrative law judge (Pet. App. A1-A108), are reported at 280 N.L.R.B. No. 11.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1987. A timely petition for rehearing was denied on March 31, 1987 (Pet. App. A134-A135). The petition for a writ of certiorari was filed on May 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO (the Union), has been the exclusive bargaining representative of the registered nurses of petitioner, Manhattan Eye, Ear and Throat Hospital, since 1980 (Pet. App. A4-A5). The Union's most recent collective bargaining agreement with petitioner expired on June 13, 1984 (*id.* at A112). After attempting unsuccessfully to negotiate a new collective bargaining agreement with petitioner, the Union commenced an economic strike on July 13, 1984 (*ibid.*). While this strike was ongoing, one of petitioner's registered nurses, Farideh Ajdari, filed a petition with the National Labor Relations Board (NLRB) to decertify the Union (*id.* at A112-A113). The NLRB scheduled a decertification election for August 30, 1984, but postponed that election, pursuant to its standard procedures, when the Union filed unfair labor practice charges alleging, inter alia, that one of petitioner's supervisors, named Euphemia James, had solicited employees to resign from their union membership in furtherance of a campaign to decertify the Union (in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1)) (Pet. App. A112-A113).

Prior to the NLRB's consideration of these unfair labor practice charges, Nurse Ajdari gathered, and on September 6, 1984, presented to petitioner, cards from 51 of petitioner's 101 registered nurses stating that they no longer wished to be represented by the Union (Pet. App. A113). On September 7, 1984, petitioner notified the Union that it had a good faith doubt concerning the Union's continuing majority support and, accordingly, was withdrawing its recognition of the Union as the exclusive bargaining representative of its nurses (*ibid.*). As support for its good faith doubt, petitioner cited the fact that a majority of the nurses had returned to work, that it believed that many, if not all, of

these nurses had also resigned from the Union, and that it had received a petition signed by a majority of the nurses asking it to withdraw recognition (*ibid.*). The Union responded by filing additional unfair labor practices charges with the NLRB, alleging, inter alia, that petitioner had unlawfully withdrawn its recognition of the Union (and thus had violated Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5)) (Pet. App. A2, A9-A10).

2. The NLRB's General Counsel filed complaints based on the various Union charges and alleging, inter alia, that petitioner's withdrawal of recognition violated Section 8(a)(1) and (5) because the evidence of loss of support by the Union was tainted by the coercive actions of Supervisor James. At the hearing with respect to the General Counsel's complaints, four of petitioner's registered nurses—Soledad Soriano, Alicia Young, Rosia Merka, and Patricia Simmons—testified that, while they were on strike, Supervisor James had contacted them and suggested that they could return to work only if they resigned from the Union (Pet. App. A114-A116).[1] Supervisor James testified that, during July 1984, she had spoken to most of petitioner's nurses in connection with her campaign for office in the

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[1]Specifically, Nurse Soriano testified that, on or about July 23, 1984, Supervisor James telephoned her at her residence (Pet. App. A37). Soriano indicated that James said that she was calling on behalf of petitioner's Director of Nursing and Director of Education to ask Philipino nurses to return to work, that Soriano could resign from the Union, and that she could not come back to work without having done so (*id.* at A114-A115).

Nurse Young testified that, on July 26, 1984, Supervisor James told her that " 'a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union,' " that she should " 'write to * * * [a particular union official] if * * * [she] wanted to resign,' " and to " 'send it by certified mail' "(Pet. App. A115). Young further stated that Supervisor James phoned her again a week later and told her that " 'almost all the nurses are resigning already * * *,' " " 'that they were coming back to

Philippine Nurses Association (*id.* at A47) but that the subject of resignation had come up in those conversations only with nurses who had first indicated that they wanted to return to work but were afraid that the Union would fine them for crossing the picket line (*id.* at A35-A36, A42, A47-A49). None of the nurses corroborated Supervisor James's testimony; indeed, Nurses Merka and Simmons stated that Supervisor James had not mentioned the possibility that they could be fined for crossing the picket line if they did not resign (*id.* at A116-A117).

On the basis of this testimony, the administrative law judge (ALJ) ruled that petitioner had not committed the charged unfair labor practices (Pet. App. A1-A108). He found that many of Supervisor James's responses were evasive and that her testimony could not be credited to the

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work,' " and that, " 'you can come back any time * * * but you have to resign first from the union * * *' " (*ibid.*). Young replied that she was not " 'coming back to work until the strike is over' " (*id.* at A116).

Nurse Merka testified that Supervisor James telephoned her, on July 27, 1984, indicating that she had been asked by petitioner's Director of Education to " 'call the Filipino nurses to return to work' " (Pet. App. A116). Nurse Merka further stated that, a week later, Supervisor James called her again and, in the course of that conversation, remarked that Merka was " 'still not back to work,' " that she should write to her union official, and that, " 'if I need some help to write, she could help me to write the letter that I will no longer be a member of [the union]' " (*ibid.*).

Nurse Simmons testified that, late in August, when the strike was almost over, she had telephoned the hospital nursing office to find out the procedure for returning to work and that Supervisor James had answered the phone (Pet. App. A46, A117). She further stated that Supervisor James had told her to send a resignation letter by certified mail to the Union and, furthermore, that Supervisor James had dictated the format of the letter and had told her that this was the procedure she had to follow to return to work (*id.* at A117). Simmons in fact submitted a letter of resignation to the Union (C.A. App. 217).

In addition, another staff nurse, Parvan Valentini, testified that Supervisor James told her that, " 'if you wish to come back to work, you have to resign from the Union' " (Pet. App. A123-A124 n.7).

extent that it conflicted with the testimony of the nurses (*id.* at A55). But he nevertheless found that the nurses' testimony did not establish that Supervisor James's actions were "coercive" within the meaning of Section 8(a)(1) and therefore that petitioner's withdrawal of recognition from the Union was not "tainted" by those actions (*id.* at A59-A69, A81-A89).

The NLRB, however, found merit in the exceptions taken with respect to the ALJ's findings (Pet. App. A109-A130). It observed that an employer does not violate the NLRA merely by providing information to employees concerning how to resign from a union " 'as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right[,] nor offers any assistance, [n]or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation' " (*id.* at A121). Here, it found that Supervisor "James [had] solicited resignations from the Union and conditioned return to work on resignation from the Union," that "James [had] explicitly stated that she was calling on behalf of her superiors," and that "James [had] thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership" (*id.* at A122). In such circumstances, the NLRB concluded, petitioner had done more than provide information or proffer "ministerial" assistance to the nurses; rather, petitioner had engaged in conduct that "tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference * * * regardless of whether there is evidence that * * * [Supervisor James] actually achieved a coercive effect" (Pet. App. A122, A123 (citations omitted)). And, "[h]aving found this violation," it concluded "that [petitioner's] asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union" (*id.* at A123, A124). Accordingly, it entered a remedial order requiring, among

other things, that petitioner bargain with the Union upon request (*id.* at A125-A127).

3. In a per curiam opinion, the court of appeals upheld the NLRB's decision and enforced its order (Pet. App. A131-A133). The court found "that there is substantial evidence on the record to support [the NLRB's] determination" (*id.* at A132).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. After a collective bargaining agreement expires, a duly recognized union enjoys a presumption of majority support and an employer must continue to recognize and bargain with that union. See *Bellwood General Hospital, Inc.* v. *NLRB*, 627 F.2d 98, 102-103 (7th Cir. 1980); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982). The employer may withdraw its recognition and refuse to bargain only if it has "clear, cogent, and convincing" evidence that the union in fact no longer enjoys majority support or an objectively based reasonable doubt concerning the union's continuing majority status. See *NLRB* v. *Pennco, Inc.*, 684 F.2d at 342; *NLRB* v. *Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978). Importantly, no such reasonable doubt may be found where the employer is judged to have engaged in activities that, in the totality of the circumstances, have a "reasonable tendency" to intimidate employees in the exercise of their choice whether to continue to support the union. *Amason, Inc.*, 269 N.L.R.B. 750, 750 n.2 (1984), enforced mem., 758 F.2d 648 (4th Cir. 1985); accord, *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1971); *A.A. Superior Ambulance Service*, 263 N.L.R.B. 499, 511 (1982). The NLRB found, and the court

of appeals agreed, that Supervisor James's activities had precisely such a coercive tendency. See Pet. App. A122-A123, A132. Thus, the decision below is in accord with settled law.

2. Petitioner errs in suggesting (Pet. 18-29) that the NLRB failed to find a causal link between the unfair labor practices and the disaffection of a majority of the bargaining unit. The determination that there was such a causal link does not require a finding that specific employees were coerced by the unfair labor practices, but can be based, as it was here, on the NLRB's finding that the unfair labor practices created an atmosphere in which employees would reasonably tend to feel intimidated or coerced. See *Amason, Inc.*, 269 N.L.R.B. at 750 n.2; *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d at 16: *A.A. Superior Ambulance Service*, 263 N.L.R.B. at 511; see also *Clear Pine Mouldings, Inc.* v. *NLRB*, 632 F.2d 721, 730 (9th Cir. 1980) (bargaining order is appropriate when it is "reasonable to infer that * * * [employer] might have caused the decline in union membership through its own unfair labor practices"), cert. denied, 451 U.S. 984 (1981); *NLRB* v. *A.W. Thompson, Inc.*, 449 F.2d 1333, 1337 (5th Cir. 1971) ("bargaining order is appropriate even in the absence of proof that the Union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the Company"), cert. denied, 405 U.S. 1065 (1972).[2] Here, the

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[2]The cases that petitioner cites (Pet. 21-26) are not to the contrary. In *Daisy's Originals, Inc.* v. *NLRB*, 458 F.2d 493, 500 (5th Cir. 1972), the court relied on the NLRB's finding that the employer's prior unfair labor practices would not adversely affect an election. In *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d at 16 (citation omitted), the court found that, based on the evidence in the record, the technical violations that the employer had previously committed had no " 'reasonable tendency in the totality of the circumstances to intimidate.' " In *Hotel, Motel & Restaurant Employees & Bartenders Union* v. *NLRB*, 785 F.2d 796, 799 (9th Cir. 1986), the court upheld the NLRB's *refusal* to issue a bargaining order where no "taint" from the

NLRB found that Supervisor James's actions created a situation in which employees "would tend to feel imperiled in maintaining their [union] membership" (Pet. App. A122) and therefore that petitioner's "asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing disaffection from the Union" (*id.* at A124). This finding—that petitioner's unfair labor practices would reasonably tend to intimidate employees in the exercise of their choice whether to continue to support the Union—is the "causal link" that petitioner claims is missing in this case.

Indeed, as we read the petition, the real complaint here is not that the NLRB failed to find a "causal link" between the unfair labor practices and the majority's disaffection from the Union, but rather that the NLRB made such a factual finding in the circumstances of this case. See Pet. 1, 28 (arguing that a "de minimis" or "minor" unfair labor practice cannot reasonably tend to intimidate employees in the exercise of their choice whether to continue to support a union). This Court, however, has said that the NLRB's factual findings, when affirmed by a court of appeals (as here) (Pet. App. A132), do not merit review on certiorari. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the NLRB's determination that such a

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employer's prior unfair labor practices existed. In *Pittsburgh & New England Trucking Co.* v. *NLRB*, 643 F.2d 175, 178 (4th Cir. 1981), the court denied enforcement of a bargaining order because the NLRB had refused to consider evidence proffered by the employer in support of its asserted good faith doubt. In *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 194-195 (8th Cir. 1974), and *NLRB* v. *Anvil Products, Inc.*, 496 F.2d 94, 96-97 (5th Cir. 1974), the courts found no evidence to support the NLRB's findings with respect to the unfair labor practices that underlay the bargaining orders. And, finally, in *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35, 47-50 (D.C. Cir. 1980), the court simply refused to enforce a bargaining order that had been issued, without explanation, seven years after the employer's refusal to bargain, and after the union had lost an intervening election.

causal link existed here is clearly supported by substantial evidence: Supervisor James individually contacted most of petitioner's nurses (Pet. App. A47); she then solicited the nurses' resignations from the Union (*id.* at A114-A116); she represented that she was calling on behalf of management (*id.* at A122); the nurses discussed James's telephone calls among themselves (*id.* at A68-A70); and petitioner's alleged doubt concerning the Union's majority support was based on cards from a bare majority of the employees (*id.* at A113). In these circumstances, it was eminently reasonable for the NLRB to conclude that Supervisor James's statements had a "reasonable tendency" to intimidate employees in the exercise of their choice whether to continue to support the Union and that knowledge of Supervisor James's unlawful statements was not confined to the five nurses who testified at the hearing. See *Irving Air Chute Co.* v. *NLRB*, 350 F.2d 176, 179 (2d Cir. 1965) (footnote omitted) ("Evidence of the dissemination of the Company's threats or that they were part of an organized program of coercion is also not required. * * * '[A]ny expressions of company attitudes even to small groups of individuals, were likely to be rapidly disseminated around a plant during the struggle of organization.' "); cf. *NLRB* v. *Mr. Porto, Inc.*, 590 F.2d 637, 639 (6th Cir. 1978) ("a close election is a factor which demands that even minor infractions be scrutinized carefully").

3. Petitioner contends (Pet. 29-37) that this case presents a "novel" question concerning whether either Section 8(c) of the NLRA, 29 U.S.C. 158(c), or the First Amendment protects "non-threatening" speech unaccompanied by coercive conduct. But petitioner's premise is wrong. The NLRB, affirmed by the court of appeals (Pet. App. A132), found that Supervisor James' phone calls to employees created a situation in which employees would tend to feel "imperiled" in the exercise of their Section 7, 29 U.S.C. 157, rights (*id.* at A121-A122). Thus, the speech and conduct involved in this

case were not, as petitioner alleges, "non-coercive" and, accordingly, were not entitled to the protection of Section 8(c) or the First Amendment. See *Electrical Workers* v. *NLRB*, 341 U.S. 694, 704 (1951) ("[t]he remedial function of [Section] 8(c) is to protect non coercive speech * * * in furtherance of a lawful object"); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477-479 (1941) (same with respect to First Amendment). See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF MANHATTAN EYE, EAR & THROAT HOSPITAL

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REPLY BRIEF OF MANHATTAN EYE, EAR & THROAT HOSPITAL

INTRODUCTION

The briefs submitted by Respondents Local 1199, Drug, Hospital and Health Care

Employees Union, RWDSU, AFL-CIO ("Union") and the National Labor Relations Board ("Board") seek to hide behind the "facts" (relying, in many cases on "facts" never found and inferences never drawn by the Board) and disregard the fundamental legal issues raised by the Petition for a writ of certiorari ("Petition"). Those legal issues include: Does this Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), apply in the context of an employer's withdrawal of recognition from an incumbent union based on good faith doubt as to the union's majority status? More specifically, must there be more beyond the mere existence of an employer unfair labor practice in order to justify a bargaining order nullifying the expressed wishes of an apparent anti-union majority? If so, in what manner should the Gissel principles apply? Who should have the burden of proof as to whether there is or

is not a causal link between an employer unfair labor practice and the majority's disaffection from the union? At what point is that burden met? These are legal, not factual, issues. Respondents' reliance on the "substantial evidence" test as a basis for denying certiorari (Board Brief, pp. 8-9; Union Brief, p. 15) is therefore misplaced.

With respect to the second issue raised by the Petition, we believe that the Petition does not require further support in this reply brief, save for one point: The Respondents have simply assumed that, in case of a conflict between Sections 8(a)(1) and 8(c) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158, Section 8(a)(1) necessarily prevails. In other words, Respondents are saying that once the employer free speech protected by Section 8(c) and the First Amendment actually succeeds in persuading an employee

to reject a union, it loses its protection. That would read Section 8(c) out of the Act.

ARGUMENT

I. The Decision Below that the Hospital Violated § 8(a)(5) of the Act Abrogates the Nurses' Right of Self Determination Under § 7 of the Act

A. The Gissel Standards Apply in the Context of a Withdrawal of Recognition

In Gissel, this Court confronted situations where employers had committed unfair labor practices during union organizing campaigns, thus arguably precluding fair elections. The Board wished simply to order the employers to bargain with the unions in lieu of elections, or despite election results. This Court wisely recognized that such bargaining orders could result in consummation of a collective bargaining agreement between an employer and a union that did not enjoy majority support.

Consequently, in Gissel this Court held that the Board must find that the unfair labor practice was outrageous and pervasive, or alternatively, that the practice actually impeded the election process, before it can enter the drastic remedy of a bargaining order. 395 U.S. at 613-615.

As we showed in the Petition (pp. 21-26), a number of Circuit Courts of Appeal have construed Gissel in the context of a withdrawal of recognition to mean that when such withdrawal is preceded by an employer unfair labor practice, the withdrawal should be voided and remedied by a bargaining order only if the Board expressly finds that the unfair labor practice actually caused the majority's disaffection from the union. Petition, pp. 21-26.

The Respondents have refused to say whether they agree with Manhattan Eye,

Ear & Throat Hospital's ("Hospital") interpretation of Gissel. Indeed, although the reach of Gissel is the central issue raised by the Petition, the Board does not cite, much less discuss Gissel, either in its decision below or its Brief to this Court (except once, on different point, Board Brief, p. 10). It is difficult to conclude from this that the Board truly acknowledges the authority of Gissel in the context of a withdrawal of recognition. Nor do the Board's Brief to this Court or decision below express the slightest concern about, or even awareness of, the possibility that the bargaining order infringed the nurses' Section 7 rights. Compare Gissel, at 614 ("effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior"). And, as shown below, the Second Circuit's enforcement of the Board's bargaining order fails to comport with Gissel's teachings.

Yet, while not acknowledging the controlling effect of Gissel, the Board's Brief shrewdly does not expressly deny that it applies. The Board evidently recognizes that to express forthrightly such denial (although such denial is the Board's underlying but unstated position) might enhance the likelihood of this Court's granting certiorari in light of the several Circuit Courts of Appeal that have expressly held that Gissel does apply. See Petition, pp. 21-26. Furthermore, the Board's present contention that the Circuit Court cases applying Gissel in circumstances like these might be distinguishable on their facts (see Board Brief, pp. 7-8 and n.2) misses the real issue -- those cases applied a fundamentally different legal standard than was applied here.

Absent guidance from this Court, the Board appears determined to refuse

recognizing that Gissel controls in the context of a withdrawal of recognition, and continue applying what amounts to a per se rule that the existence of an employer unfair labor practice automatically precludes the majority of the employees from exercising their right to refrain from union activity. Then, on appeal to the courts the Board will continue in each case to claim that its decision actually rested upon an unstated factual analysis of the effects of the unfair labor practice in dispute.

The Union's position is somewhat different than the Board's. The Union views the basic issue as being who bears the burden of proof on the question of whether the employer unfair labor practice actually caused the majority's disaffection from the union. Union Brief, pp. 4, 14, 25-26.

The Union construes Gissel and its progeny to mean that if an employer's

withdrawal of recognition had been preceded by an employer unfair labor practice, the employer has the burden of proving that the unfair labor practice did not cause the majority's disaffection which led to the withdrawal of recognition. Union Brief, p. 25. In other words, the Union contends that an employer in the Hospital's position must prove a negative -- i.e., that one event did not cause another. Indeed, the Union contends that in this case the Hospital failed to meet its burden because it did not call as witnesses all 51 nurses who petitioned the Hospital to withdraw recognition, to prove that they were unaware of the events constituting the unfair labor practice. Union Brief, p. 26. (No evidence was adduced at the hearing that any of those nurses were aware of the events.)

Even the Board does not share the Union's view of the law, a view which we

believe is incorrect for at least two reasons. First, Gissel's limitations on bargaining orders were motivated by solicitude for employees' rights. To hold that their rights will be protected only if the employer does or does not do something in a hearing to which the employees may not even be parties would seriously weaken those rights in a way inconsistent with Section 7 of the Act.

Second, the employer's burden of proof, as articulated by the Union, would be unmeetable in practice and therefore nothing more than a disguised version of the per se rule applied by the Board in this case. If, as the Union contends, all of the nurses who expressed a desire to cease supporting the Union should have been subpoenaed, examined, and cross examined about their states of mind, the hearing would have taken months, instead of a week. Furthermore, if the facts remained

the same except that the bargaining unit encompassed 1000 employees, rather than 100, should the Hospital have been required to present 500 witnesses to prove a negative? It is not surprising that the Board has not joined the Union's argument on this point.

This sub-issue -- who has the burden of proof and what it takes to meet that burden -- is itself so important as to merit this Court's review. The Circuit Courts of Appeal are in disagreement as to whether that burden lies, in the first instance, with the employer or with the Board's General Counsel. Compare Hotel, Motel and Restaurant Employees and Bartenders Union Local No. 19 v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986) ("[i]f the General Counsel presents evidence showing that the union's decline in support was attibutable to the employer's misconduct, the employer's claim of a good

faith reasonable doubt [of the union's majority status] fails. Absent such evidence, the employer prevails.") with NLRB v. Nu-Southern Dyeing & Finishing, Inc., 444 F.2d 11, 16 (4th Cir. 1971) ("[a]n employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to . . . a loss of [union] majority").

B. Under the Standards of Gissel and Its Progeny, the Second Circuit Should Not Have Enforced the Board's Order

The Board's and the Union's arguments as to why the decision below was correct rely on "facts" never found by the Board. It is important to note what the Board did not find:

- It did not find that the unfair labor practice was "serious" as opposed to a "technical violation." Compare Union Brief, p. 27.

- It did not find that the unfair labor practice "was in furtherance of a

campaign to decertify the Union." See Board Brief, p. 2. (In fact, the unfair labor practice occurred between July 23 and August 9, 1984, which was after the decertification petition had been filed on July 18, 1984. ALJ Dec. A34, A6-7.[1])

- The Board made no finding as to whether any of the 51 nurses who petitioned the Hospital ever learned of the events constituting the unfair labor practice. Compare Board Brief, p. 9, asserting that "it was eminently reasonable for the NLRB to conclude . . . that knowledge of Supervisor James's . . . unlawful statements was not confined to the five nurses who testified at the hearing." Leaving aside whether the record would have supported such a conclusion, no such

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[1] References preceded by "ALJ Dec." or "Board Dec." are to the decisions of the Administrative Law Judge or of the Board, followed by the page of the Appendix to the Petition where the referenced material may be found.

conclusion is expressed or even hinted at in the Board's decision.

- The Board made no finding and drew no inference as to whether the unfair labor practice "tended to undermine the majority strength of the Union," as claimed in the Union Brief at p. 23. Although the Board did find that the unfair labor practice unlawfully interfered with employees' rights, it definitely did not say whether such interference had any effect on the Union's majority. It expressly disclaimed making any finding as to "whether there is evidence that James actually achieved a coercive effect." Board Dec. A123. Although such evidence may not have been necessary to support the finding of an unfair labor practice under Section 8(a)(1) of the Act, it should have been necessary to support a finding of a violation of Section 8(a)(5) of the Act and consequent entry of a bargaining order. See Gissel, at 614 (bargaining order may be

appropriate where the unfair labor practice had "tendency to undermine majority strength and impede the election processes").

- The Board made no finding as to whether the unfair labor practice would have had any effect on the decertification election sought by the nurses and blocked by the Board because of the Union's unfair labor practice charges. See ALJ Dec. A7. Under Gissel, such an election obviously would have been a preferred remedy, but the Board declined to say why it would not permit the election. The Board's and Union's basis for distinguishing People's Gas Systems, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) -- that an election was held there, confirming the majority's anti-union sentiment (Board Brief, pp. 7-8 n.2; Union Brief, pp. 28-29) -- is disingenuous. Here, the Union, with the Board's concurrence, has prevented the

employees from voting in a secret ballot election on rejecting or retaining the Union.

The Board and the Union have been quite imaginative in speculating what facts the Board might have found and inferences it might have drawn. The essence of the Board's decision, however, is its statement that the withdrawal of recognition in accordance with the majority's demand was invalid because it was not "in a context free of unfair labor practices of the type aimed at causing disaffection from the Union." Board Dec. A124. The Board's decision thus applied a per se rule that if an employer commits an unfair labor practice, its employees are then precluded from petitioning for the cessation of union representation, either through a decertification petition or through a direct petition to the employer.

This per se rule explains why the Board never bothered to address the actual

effect of the unfair labor practice, or the potential adverse effect of its bargaining order on the nurses' Section 7 rights. (One effect would be that the nurses could be forced into a multi-year agreement struck on their behalf by a union that they do not support.[2])

There is nothing in the Board's decision to indicate that it (and the Second Circuit Court of Appeals on the petition for enforcement) correctly applied Gissel. Gissel itself is not cited anywhere in the decisions of the Board and the Second Circuit.[3]

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[2] In addition to this serious effect, the Board's finding of a violation of Section 8(a)(5) of the Act led it to impose substantial financial penalties against the Hospital. See Petition, p. 41 n.6.

[3] This Court may wish to consider summarily reversing the Second Circuit and remanding the case for re consideration in light of Gissel. See Sup. Ct. Rule 23.1.

That the Board applied a per se rule is further confirmed by the absence of reference to the fact that the few nurses who testified for the Board about the unfair labor practice also testified that they were pro union and that James' remarks to them did not alter their stance, and to the fact that those nurses were not among the majority who petitioned the Hospital to cease bargaining with the Union. Compare Fremont Newspapers, Inc. v. NLRB, 436 F.2d 665, 673 (8th Cir. 1970) (refusing to enforce bargaining order in part because employees who were subject of unfair labor practice "remained strong Union adherents and took no part in the later filing of the formal decertification petition").

In sum, the Board did not find any facts that would support a bargaining order under Gissel. Consequently, the Board and the Union should not now be permitted to supply an after-the-fact rationalization

for the result reached. Compare NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981) ("It is . . . inappropriate to enforce bargaining orders where the Board's rationale for the order was conclusory . . .") and NLRB v. Gruber's Super Market, Inc. 501 F.2d 697, 704 (7th Cir. 1974) (Board must "explain its conclusions in terms reviewing courts can understand").[4]

II. The Questions Presented Deserve Supreme Court Review

Neither Respondent has disputed that the legal issues raised by this case are important and deserving of this Court's attention. Given the need for a clearly

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[4] Furthermore, the Board's decision herein should be subjected to heightened judicial scrutiny because it reversed the administrative law judge. See NLRB v. Tru-Line Metal Products Co., 324 F.2d 614, 615 (6th Cir. 1963), cert. denied, 377 U.S. 906 (1964).

defined and nationally consistent federal labor law, and given the uncertainty engendered by the reasoning and result reached below in comparison to similar cases in other Circuits, the Hospital respectfully suggests that certiorari is appropriate. That would enable this Court to resolve important questions about the reach of its decision in the Gissel case.

CONCLUSION

For the reasons set forth above and in the Petition, the Hospital respectfully requests its Petition be granted.

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Respectfully submitted,

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